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Introduction to international corruption: implications for states and multinational enterprises

Michelle Bachett
Kim Hong
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To our families

Introduction to International Corruption: Implications for States and Multinational Enterprises

PART 1: Criminalization of International Corruption and International Conventions¹

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Introductory remarks

National and international corruption is an important topic, evolving in recent years at both the national and international level, following the path of international conventions that use compliance at the national level as an effective form of international corruption.

We can give some terminological aspects to corruption such as: “(...) behavior which deviates from the formal duties of a public role because of private (personal, close family, private clique), pecuniary, or status gains; or violates rules against the exercise of

¹The Part 1 is written by Michelle Bachett, Ph.D, Attorney at Law, US.

certain types of private influence. This includes such behavior as bribery (use of reward to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private uses) (...)" (Mckitrick, 1957; Nye, 1989; Gray, Kaufman, 1998; Taylor, Santosuosso, Hardie, Ferber, 2008; Aidt, Dutta, Sena, 2008; Jonker, 2009; Warin, Diamant, Root, 2011; Wang, 2011; Stewart, 2012; Ashcroft, Ratcliffe, 2012; Sidorkina, 2013; Arnone, Borlini, 2014; Themeli, 2014; Johnston, 2014; Rose-Ackerman, Palifka, 2016; Westbrook, 2017; Le Fèvre, 2018; Zurnic, 2019).

In this spirit, we also consider the philosopher Smith as a position of criticism and starting point for understanding and deepening the close link between the economy and corruption, considering the aspect of production of negative externalities which can be seen in the distortion of competition with repercussions that have to do with free trade, innovation and management of healthy companies, the competitive advantage of corrupt ones and the disproportion of public spending such as the alteration of its logical distribution and the discouragement of foreign investments (Hill, 2006).

From a practical point of view, the results are ambiguous, especially in the sector of international corruption and especially

in countries such as the United States. We remember the Foreign Corrupt Practices Act (FCPA) of 1977, a law approved by the American Congress, way back in 1977, as an important step that followed particular paths of attention especially in the multinational sector. We can say that a first phase ended in 2000 where the American model was also adopted in other countries through the instrument of international conventions which characterized the action of the American Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) which has gone beyond national borders, thus also addressing the topic of corruption of foreign multinational enterprises.

The legal transplant of the international legislation and especially of the legislation of the US concerning national legal systems through a conventional system has moved on to a hybrid imitation in European national legislation and beyond.

Above all, the FCPA was “adopted” by the United Kingdom through the Bribery Act of 2010 and in France with Loi Sapin II of 2016 addressing in such a way the phenomenon of international corruption in multinational enterprises by responding effectively to the attack of foreign companies which actually increased in number and moved from the United States to Europe.

In our opinion the problem is not so much new rules of all kinds

but their application as “effective” regulations that truly combat the corruption phenomenon at a transnational level by building a new global framework, organizational models and compliance programs where multinational enterprises will be forced to adapt (Ivory, 2019).

We are not sure, from what we know to date, that the FCPA as a legal transplant has helped and effectively resolved the corruption situation in Europe and/or opened the way for international cooperation by providing guidance for combating multinational enterprises, thus avoiding sanctions on the American DoJ and on international economic operators.

Corruption as “corporate” phenomenon of international inspiration

The fight against corruption dates back to antiquity, specifically to the code of Hammurabi which in its legal text prohibited the judge from changing his decision once it had been decided. It was a type of “dangerous crime” with the aim of avoiding gifts to public officials and in one's own conscience (Brioschi, 2017).

In Ancient Rome the historian Tacitus spoke of corruption, indicating the foreign policy of the time and international relations, referring to the peace builders who intervened in the

Afghan conflict, tolerating the corruption of local factions, thus allowing the entry into forced peace negotiations (Cheng, Zaum, 2012; Strand, 2014). Sallust told how the entire Roman Senate was bribed to avoid the death of a man. Plutarch recounted: “(...) the appropriations of public money by Caesar, who forced the doors of the Treasury to be able to access it at the will, and replied to Metellus that weapons and laws operate at different times, and since there was war could not even stop to discuss it (...). The anti-corruption law in force in that period, in fact, expressly prohibited gifts aimed at influencing political decisions (...). Neither the courts nor the legislators bothered to draw a clear boundary between the mere contributions to electoral campaigns and the actual corrupt conduct of congressional candidates, thereby making the stringent regulatory provisions ineffective and unapplied (...)” (Teachout, 2014).

The history of corruption shows us that it was not a cultural phenomenon. Economic, social and political changes modified the forms of manifestation of such increasing and illicit phenomenon (Tanzi, 2002).

The growing trade and economic system has become more complex over time. It led the World Bank as early as 2004 to speak and estimate: “(...) the absolute value of global corruption at 1 trillion dollars”. It was already a truly frightening figure,

which constituted approximately 2% of the global gross domestic product (global GDP) (Mauro, 1995). Exactly ten years later, this estimate doubled. The absolute value of international economic transactions has grown considerably, in parallel with the expansion of joint-stock companies outside national borders. A penetration into foreign markets of economic entities with commercial needs exogenous with respect to local contexts, i.e. a phenomenon which could have repercussions in the proliferation of opportunities for the perpetration of corruption episodes. The absolute value of corruption appears not to have decreased, but rather to have increased in an almost proportional manner. The growth in the absolute value of global corruption therefore seems to be linked, to some extent, not only to the emergence of the dark figure, but also to the increase in international economic transactions, thus predicting the existence of recurring illicit operating methods (Lawder, 2020).

Within this context, a main role has been played by multinational enterprises that drive the growth of transnational economic operations and the entities that are exposed to this phenomenon of corruption on a global scale. We can talk about a corporate corruption that is noticeable today.

Corporate corruption and criminalization

The anti-corruption phenomenon as a political, economic, social and legal system has become sophisticated in recent years and has followed a path of continuous undisturbed diffusion (Jacoby, Nehemkis, Eels, 1978; Jessee, 2017). The main body for international corruption of a multinational dimension is the enterprise/corporation at the international level (Delmas-Marty, Tiedemann, 1979).

The commercial dealings of companies through illicit payments open up new markets and, above all, for local companies to start a joint venture with a commercial partner that is already present in the foreign territory to respond and thus increase the profitability of the national company. The internationalization process is faced with obstacles and resistance, including cultural ones, inducing thus the multinational enterprise to resort to illicit payments of various types and across vast geographical areas where corruption is a widely spread and accepted business. On the other hand, national institutions remain lacking and policies are in constant conflict due to the international corruption of multinationals without thus bridging and repressing a phenomenon that is constantly evolving.

Within this context the US protagonists in criminal law are seen

as authentic pioneers in a global debate that guides the process of criminalization to corrupt conduct for the official located abroad, to a geopolitical system and to foreign governments that follow the path of silence without repressing corporate corruption.

The process of criminalizing corruption has allowed us to better understand both American politics and the functioning of foreign multinationals at a transnational level, resulting in the failure of the legal transplant of the American model that began in the 1970s.

We can note two different phases in the history of international corruption and especially in the American continent. The first which ended during the early 2000s, the period where international corruption was based on the export abroad of the American model and its own regulations that promoted the advancement of international agreements as incrimination obligations for the adhering countries and with a general persuasive force. A second phase, after the year 2000 which focuses on the repression of corruption through a direct and extraterritorial American anti-corruption law which highlights the strength of the sanction. From the export of the rules we moved on to economic sanctions according to American legislation.

The fight against international corruption has been based in our days on the effects that can be seen in multinational enterprises

for various states within and outside the US, as a discipline that is confronted with an American-inspired legislative instrument that the process of criminalization and the attempt to legal transplant shows a temptation to export its model to foreign jurisdictions, thus investigating the causes that have led to a system of bankruptcy and without positive effects of solving the problem. This is a process of criminalization that has moved away from the framework of a substantial anti-corruption system based on the FCPA and according to the profile of regulatory provisions that are different from the enforcement focused on the foundations of the process of criminalization of international corruption.

The Foreign Corrupt Practices Act of 1977

The FCPA of 1977 was adopted by the American parliament after approximately two years of open debate and under the presidency of Jimmy Carter. The FCPA has constituted a legislative instrument for the repression of corporate corruption on a global scale (Koehler, 2014a; Carter, 2020). This is a historic moment for global corruption and we must analyze three moments as steps for its adoption.

First of all we must consider that this process was important for

the legislative instrument that matured when in the seventies the adoption of the FCPA was a necessity given the scandals that provoked a profound reflection on the political system of entrepreneurs on the American continent. The FCPA had not only a national but also an extra-territorial character. Its approval is characterized by various lines which can be seen in interventions especially after the presidential elections of 1976 which guided to an affirmative law text which has remained more or less the same up to the present day. The export period was a long process of a legislative model that constituted one of the examples of legal transplant in contemporary legal history under a unique and formal profile with reservations that traced a clear separation through the receipt of regulatory provisions and its own level of enforcement (Cartier Bresson, 2020).

(Follows): The economic scandals of the seventies

The scandals noted during the seventies and their interpretation had a certain importance for the history of American corruption². The FCPA is not part of an internal regulatory requirement but also as a necessity, a consequence of the foundations where this

²Flora v. U.S. 362 U.S. 145 (1960): “(...) the legislative history of a statute is the most fruitful source of instruction as to its proper interpretation (...)”.

legislative instrument was conceived since its enactment with the differences accepted in time³. First of all, let's remember the Watergate scandal, as a widespread system of illegality due to illicit financing that caused damage to ordinary accounting⁴. Corruption and slush funds have given to public and private economic organizations the need to delve deeper into a phenomenon where the bodies controlling the stock market, i.e. the SEC, that was an economic scandal at the time. The investigations of the SEC and the parliamentary inquiry of the Church Committee have brought to light a system of illicit foreign payments involving more than 400 American and foreign multinationals (Lindsey, 2009; Livshiz, 2014). The SEC had the task to investigate and sanction the offshore slush funds of multinational enterprises which contained millions of dollars hidden from investors and therefore also from the financial market guarantee authority, with consequent violation of the obligations of disclosure required by American laws at the time. The Church Committee, however, acted on the political and foreign policy level, on which the corruption of foreign public

³See the Report "Investment Regulation" of 1979 and the Report "Foreign Corrupt Practices Act" of 1980.

⁴SEC, Report on Questionable and Illegal Corporate Payments and Practices, 1976: <https://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf>

officials by American companies risked having a considerable impact. The work of the two bodies ended up being the lifeblood and stimulus for the other, allowing the process to be started that led to the criminalization of international corruption throughout the world. We have seen the introduction, from the American legal system, of anti-bribery provisions, but also over time, to all foreign legal systems. For the United States it was not so much a question of public or private morality but an important question of foreign policy (Casino, Marberry, 2013; Hamann, 2019)⁵.

Corrupt conduct through multinationals was inevitably a political consequence in the global market. In the words of Senator Church: “(...) the proliferation of corruption is undoubtedly (...) a problem of morality”. But the repression of corruption, in its multiple transnational and corporate dimensions, is certainly a political and foreign policy problem. This gave the Church Committee a strong basis of political legitimacy, which provided impetus to the investigations and hearings that followed between 1975 and 1977, in which the parliamentary commission investigated some of the most famous scandals in American history, and which constituted the premise history of the FCPA (Borton, Gross, 1976). In the Lockheed case, a market-leading

⁵Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 94th Cong., 1st & 2d Sess. (1975).

company in the aeronautical sector, the accusation was that it had paid bribes to foreign governments in Europe and Asia. The Church Committee revealed in 1976 that the multinational had created slush funds worth three billion yen in order to secure orders from the Japanese government. The prime minister of Japan was forced to resign the same year. An in-depth senate investigation revealed that the company had used similar methods to sell fighter planes to the Federal Republic of Germany, Italy and the Netherlands. Lockheed was not the only company in the sector to be affected by the scandal. From the Church Committee's investigation it emerged that the competitor Northrop Corporation had also acted on the Lockheed model. Lastly, public opinion was also seriously affected as the American aeronautical sector seemed to have built its success on a ramified system of international corruption (Laidi, 2019).

Same line of thought also in the Banana gate case where governments are found to pay for the importation of bananas into South America. In the oil sector, the Exxon-Mobil case involved the Italian political parties and the government at the time (Laidi, 2019). Also in this case, Senator Church stated that: “(...) the financing of American companies to political parties “friendly” to the United States risked proving to be a boomerang for the international relations of the USA. In 1975, Church expressed his

concerns publicly, noting that while corruption might serve to support the democratic, free-enterprise governments that the United States had always sought to support, its “affiliation” with foreign capital risked subverting unfavorable to the USA - the democratic bases, making - in the case of Italy - the Communist Party appear as the only non-corrupt political force within the country which, for this reason, gained electoral consensus, and the other political movements in the pay of the foreign economic interests (...)”⁶.

The phenomenon of corruption of American multinationals has put into practice the need to review and protect the international relations of the US (Koehler, 2014b).

The FCPA was connected with the political scenario that was created with Watergate and which forced Richard Nixon to leave the American presidency thus contributing to the adoption of a legislative instrument against corporate corruption to bridge public opinion and above all because of the slush funds that are used to pay bribes, in an official way we can say, worldwide (Koehler, 2010a; Spalding, 2010). The corruption system is widespread in Western systems by multinationals and as a consequence of the introduction of anti-bribery which prohibited

⁶Protecting the Ability of the United States to Trade Abroad: Hearings before the Subcomm. On Int’l Trade of the S. Comm. On Fin., 94th Cong. (1975).

and severely punished companies, thus accelerating the approval of the FCPA (Barbara, Lacey, Birmele, 1999; Koehler, 2010b; Lord, King, 2018).

The inspiring spirit of the FCPA was an appeal to reduce the harm to American entrepreneurs, where in the face of political reactions, they found legislative solutions that were adequate to practices involving the accumulation of slush funds involving illicit payments to foreign officials. In this way, public opinion inevitably discovered a practice of questionable payments as well as the lack of legislative provisions that expressly prohibited such policies (Suse, 1982).

A deficient system of anti-corruption legislation

The Watergate scandal as well as the official opinions of the SEC have made it possible to talk about corporate abuses consisting of false or inadequate accounting records which in many cases concerned illicit or improper payments to national or foreign public officials and, on the other hand, that such “abuses” they did not constitute “criminal violations” in all the cases addressed, since “there were no regulatory provisions that expressly prohibited them” or that identified them more generally as “violations” of any law, i.e a problem of deficiency in the law.

From the hearing of the SEC officials, it emerged that not only the conduct of falsification of accounting books and the creation of slush funds and the payment of bribes to foreign public officials were not facts foreseen by federal law as crimes in themselves, but rather did not constitute violation of the law (even non-criminal) *sic et simpliciter*, for which they were not expressly and specifically sanctioned in any way⁷.

The FCPA was a legislative instrument of a revolutionary nature which allowed (faced with the lack of a concretely inspired regulation regarding questionable payments) the multinationals to insert taxation and antitrust, securities in an ordinary but not a detailed text, thus keeping account of the connections with other disciplines that concerned *ad hoc* sanctions in the matter. It was a text that classified illicit and improper payments as illicit and criminally relevant as separate conduct in the field of securities, taxation and anti-trust since they could come into conflict. In other words, the topic of international corrupt conduct was part of the criminalization and filled with the enactment of the FCPA (Jimenez, 2019).

⁷Abuses of Corporate Power: Hearings before the Subcommittee on Priorities and Econ, in Gov't of the Joint Econ. Comm., 94th Cong. (1976).

Deficiency and securities law

The topic of securities is connected with enterprises that are involved in scandals involving public ones and capital spread in relation to international corruption conduct outside the territory of the US, thus affecting balance sheets as well as the transfer of stock affected the value of the securities themselves. The SEC certainly played an important role in the adoption of the FCPA and above all in the structure of the legal text which is based on accounting records and internal control provisions. Without playing any role in enforcement, the anti-bribery system was adopted with provisions and sanctions regarding “(...) books, records and internal controls (...)” (Koehler, 2010a). In this spirit, many enterprises: “(...) had falsified accounting entries in their balance sheets to create the necessary financial provision and hide illicit payments from the eyes of investors and regulatory bodies”. Thus the anti-bribery legislation, to be truly effective, it should have also intervened in matters of accounting and financial statements, containing prohibitions against false or misleading notes by the corporate bodies towards those in charge of controlling the accounting books and financial operations of the company. They requiring management to establish and maintain its own internal control system created to provide a

reasonable guarantee that corporate transactions are carried out in compliance with the authorizations provided by the directors. Finally, that said transactions are reported in the company accounts in so as to allow the preparation of financial statements in accordance with generally accepted accounting principles or other criteria applicable to the specific statement (Koehler, 2008)⁸.

As can be understood, the American system certainly had the opportunity to guarantee its own security system for the circulation of shares. We saw whether the results were positive or negative with the criticisms made during and after the Watergate scandal. We recall from the federal states the Blue Sky Law relating to the regulatory provisions concerning the stock market and the first law on securities. The relevant law provided for disclosure of “material facts” that could have an influence on the transactions of the securities that were registered (Borton, Gross, 1976). Next we take into account federal laws, i.e. the Securities Act (1933) and the Securities Exchange Act (1934). By the 1930s the Blue Sky Law, the Securities Act and the Securities Exchange Act were the basis for their simultaneous control. Furthermore, they had complementary functions within the applications.

⁸SEC, Report on Questionable and Illegal Corporate Payments and Practices, 1976.

Specifically, the securities act included the operations of initial distribution and the exchange act had to do with the post-initial distribution. It was a fairly closed, rigorous regulatory path that prohibited false declarations and omissions in sales transactions regarding the purchase of securities. The Securities Act had the objective of filing a statement with the SEC that included data and information presented by investors. An information, relevant for the choice of purchasing securities and subject to the prohibition of alteration or omission. The Exchange Act on the other hand provided for a prohibition on falsification and/or omissions of “material facts” which concerned the statement that was filed and which altered the free choice of investors by also taking into consideration the disclosure of the issuer of the financial reports which included information that was potentially relevant.

Apparently everything seemed efficient during the Watergate scandal, namely to notice and capture dangerous conduct as well as sanction it. According to the opinions of the SEC: “(...) these provisions did not make the falsification of accounting books criminally relevant in itself, but rather it was necessary to demonstrate that the annotation concerned precisely “material facts” affecting the trading of securities, since on the other hand there was no criminalization of “questionable payments” as such,

they were rather definable simply as “improper” and not as “illegal” and therefore it was necessary, case by case, to identify the recurrence of those indicators that made the alteration or omission relevant to the decisions to purchase and sell securities, or at least “price sensitive”, so as to bring “improper payments” within the concept of “material facts” and therefore the conduct within the scope of application of the rules dictated by the network of provisions on securities (...)”⁹. At a regulatory level every questionable payment or transaction fell within the notion of material, “simply because it was improper”. It was therefore necessary to intervene, as will actually be done with the adoption of the FCPA, to introduce a legal text included in the regulatory framework of the provisions on securities, or in any case coordinated with the same, which provides for the prohibition of

⁹Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, *supra* nota 73, § 59-60 (statement of Raymond Garrett, Chairman, U.S. Sec. & Exch. Comm’n) which is affirmed that: improper foreign expenditures are not to be regarded as material simply because they are improper, without more. What principles govern the separation of those that are material and those that are not? Is it the method by which payments are made, the size of the payments, the purpose for which they are made, or the hazards to the business for exposure of the payments? It is, I believe, all of these, in different proportions in different situations (...)”. SEC v. Sanitas Service Corporation.

concealing improper payments in the accounting and of classifying them in themselves as illegal, and therefore criminally sanctioned (Koehler, 2012).

The choice was the adoption of a law that was part of the Securities Exchange Act of 1934 based on two different paths: anti-bribery provisions and books, records and internal controls provisions which seek to bridge the relevant legislation in the field of securities, i.e. the so-called deficiency of law (Koehler, 2012).

Deficiency and tax law

As we understood from the previous paragraph, the securities law did not only include deficiency. In fiscal and tax matters the topic had to do with the improper payments. The costs envisaged their own illegality in themselves and were from a criminal point of view improper (Bull, 1983). In particular, Section 162(c) of the United States Tax Code provided: “(...) the prohibition on deducting as legitimate expenses all payments, direct or indirect, to officers or employees of any government, governmental agency or public body (...). This prohibition related solely to the deductibility of the amount paid, not to the conduct per se, which therefore did not correspond to any criminal sanction (...)”

(Nicholls, Daniel, Bacarese, Maton, Hatchard, 2017; Cabirol, 2019)¹⁰.

As far as federal legislation was concerned, irregular taxation was sanctionable and deductible from a tax perspective given that it constituted an alteration to the budget and the recording of payments, “questionable” as a system of alteration that concerned the economic situation of multinationals. The costs that are deducted involve an increase that concerned the tax debt and could fall within the related concept of material and of the securities law which was reprehensible by the SEC. The compliance defect remains the provisions on taxation and securities which did not make the related payments illicit in themselves and from the point of view of criminal liability (Campbell, 2013).

The improper payments were significant and treated in accordance with the tax regulations which prohibited deductibility. Its commission did not follow up on its own irregularity of tax returns but it remained per se lawful and not sanctionable. On the subject it is understood that the relative void did not concern the criminalization of conduct for international corruption and the necessity that regulated and influenced the

¹⁰U.S. Code Title 26-Internal Revenue Code (Aug. 16, 1954, ch. 736, 68A Stat. 3: <https://www.law.cornell.edu/uscode/text/26>; Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095.), Sec. 162.

FCPA (Carner, Esser, 2006; Koehler, 2012).

Deficiency and antitrust law

As we have understood from the previous paragraphs, the questionable payments, i.e. the multinationals that brought legal action against public officials, such as members of government and/or of foreign political parties, had as their objective asset protection as an advantage in the corruption syndicate. Thus, payment to obtain commercial orders or benefits from foreign public officials was in conflict with US antitrust law. A practice that restricted competition and allowed the multinational to consolidate its position on the market, thus assuming the relative monopoly in a reference sector from a competing company.

By altering competition within the antitrust regulations, it caused the companies under investigation to resort to improper payments and was a topic of discussion by the American authorities. We note a conflict with the regulation which concerned the need to coordinate anti-bribery provisions, thus approving the antitrust law.

In practice, the Sherman Antitrust Act (1890)¹¹ and the Clayton

¹¹15 U.S.C. 1-38: <https://www.law.cornell.edu/uscode/text/15/chapter-1>

Antitrust Act (1914)¹² have provided an important highlight in the legislation we refer to. In particular we recall Section 1 of the Sherman Act which: “(...) expressly prohibited any agreement that had the effect of restricting competition or trade between states or foreign nations (...); Sec. 2 “(...) prohibited any conduct aimed at acquiring a monopoly in a market sector between the federated states or foreign nations (...)” and; Sec. 7 of the Clayton Act prohibited mergers, acquisitions or joint ventures between American, or US and foreign companies, which had the effect of reducing competition in the relevant market (...)” (Lande, Zerbe, 2020).

The effect of competition entailed the application of the prohibitions that are foreseen by the antitrust law on conduct concerning international corruption as well as improper payments with the aim of restricting free trade in the United States and above all outside national borders by trying to influence the Antitrust Division of the US Department of Justice. The antitrust regulations that were part of the securities law and the tax law did not qualify the payments as illicit. The anti-competitive behavior was based on achieved objectives, i.e. on behaviors that were susceptible and led to a decrease in free trade and the formation of a monopoly on imports and exports of the United

¹²15 U.S.C. 12-27.

States (Koehler, 2012).

Corruption conduct had anti-competitive effects and went beyond the protection of the Antitrust Law. The bribe paid to exclude a foreign competitor as well as to give money to resolve the problems created by the competition and the related antitrust report were followed by payments such as fees that operated in countries and members of the government, heads of state or high officials as a conduct which was in favor of competition at an international level and punishable in cases involving subjects protected by immunity from the function held.

The antitrust regulation was relevant for corruption and anti-competitive behavior as an ineffective modus to capture and sanction the questionable payments, especially inspired by the need to foresee illicit facts and sanctions as facts that are criminally relevant. The need to provide in a legislative text is specified and inspired by the corrupt conduct of foreign public officials which can be qualified as facts of an illicit nature and commensurate with proportionate sanctions.

Foreign Corruption Practices Act: International Conventions (1977-2003)

The model system of the FCPA from the US has paved the way for the criminalization of international corruption on a global scale (Kpundeh, 1996; Hill, 1989; Einhorn, 2007; Foley, Haynes, 2009; Deming, 2011; Alldridge, 2012; Devis, Raskin, Moss, Dunst, 2012; Crones, Holtmeier, Koffer, 2013; Hills, 2014; Ellis, 2016; Dong, 2017; Brewster, 2017; Brigant, 2018; Brewster, Ortiz, 2020; White, D'Archy, 2020).

After the Watergate scandal, President Jimmy Carter was very clear: “(...) today's efforts, however, can only be successful in the fight against corruption if other countries and the same companies take similar actions. Therefore, I hope that progress towards negotiating a treaty on illicit payments will continue within the United Nations (...)” (Carter, 2020). The choice of the US was to combat the corruption of multinational enterprises and at the same time to stimulate the American administration by promoting international organizations towards greater awareness of foreign governments to find a unanimous force on the topic under consideration (Laidi, 2019).

The FCPA paved the way for a resolution to condemn corruption within the framework of the UN¹³. In practice, the United Nations

¹³See the Resolution of the United Nations n. 3514 (XXX) of 15 December

Economic and Social Council decided: “(...) to approve the establishment of an intergovernmental working group on corrupt practices in international commercial operations, which also completed the drafting of a text that it envisaged criminally sanctioning multinationals. But the text never saw final approval and the committee, after just three years of existence, stopped its activity, thus wrecking the US project to export the American anti-corruption model (...)” (Yannaka, Small, 1994; Laidi, 2019)¹⁴.

1975: <https://digitallibrary.un.org/record/189574>

¹⁴Laidi affirms that: “(...) legal transplant in which the United States obtained the approval of Resolution no. 2041 (LXI) from the Economic and Social Council of the United Nations of 5 August 1976 with which a working committee was established for the drafting of a common project for the criminalization of international corruption, which definitively foundered in 1979, the year in which the committee stopped working on the project and foreign governments did not accept the United States' request for formal approval of the developed project. That of 1979 can be considered the first (failed) attempt by the United States to export the American model. Indeed, the US government came very close to the objective, namely the elaboration of a common text which entailed the commitment of all member countries to provide, within their respective legal systems, for the criminalization of international corruption (...)”, efforts were made by the United States, as this project never saw the light. Yannaka, Small affirms that: “(...) the attempt to officially adopt a common and binding conventional text failed for practical, legal and political reasons. First of all, the form of the

The International Chamber of Commerce established a commission from various countries to investigate national laws on corruption and approved a recommendation for countries where multinational enterprises could draw inspiration to create internal codes of conduct as well as the establishment of a committee to monitor recommendations' objectives (Wallace, 2002)¹⁵. Even this move was not enough to solve the problem but only to effectively stimulate the criminalization of international corruption conduct by foreign governments. It is noted that the legislative system was not so restrictive, in fact the imbalances

international convention as an instrument to establish or oblige member states to establish criminal responsibility for the perpetrators of the crime was not convincing. Secondly, the transnational element of the conduct highlighted that only collaboration between the various countries could really lead to the repression of facts of similar magnitude and, at the time, there was a diversity of policies between the various countries (...). Transnationality gave rise to problematic profiles in terms of the lack or conflict of jurisdiction, which were difficult to resolve (...). The possible extraterritorial application of criminal law that such a case would have entailed risked coming into conflict with national law. In short, the impossibility of resolving these controversial points and, probably, a still immature sensitivity towards the topic, led to the failure of the first attempt to export the American model within the UN (...)"

¹⁵See the Report "Extortion and Bribery in Business Transaction" which is adopted on 1979.

were so many and as a consequence foreign countries refused to adopt an anti-corruption model like the American one and above all the sanctions were so varied thus finding themselves at a disadvantage that did not respect foreign multinationals thus allowing corruption in an “official” way (Jeydel, 2012; Jiang, 2017). Allowing anti-corruption laws to be passed without sanctions were prohibited practices in the United States. The imbalance was ineffective and the instrument adopted was compromising for competition between companies in the international market and foreign multinational enterprises resorted to “punishing” or not a foreign public official while leaving out US national managers (Laidi, 2019).

The question is whether the FCPA has limited corruption at the American and transnational levels and especially after the American reform of 1988. The problem was the offering of gifts to foreign public officials and the lawful practice of the relevant official's country of origin. International competition by American companies risked uniform regulatory interventions on a global scale for foreign companies and under a lobby initiative system the American government attempted to adopt an international convention on corruption especially in the sector of international economic transactions (Baer, 2020)

The OAS (1996) and OECD (1997) Conventions

About twenty years after the adoption of the American FCPA the Organization for Economic Co-operation and Development (OECD) in Paris on 17 December 1997 approved the Convention against corruption of foreign public officials in the sector of international economic transactions (Zedalis, 1997; Pierros, Hudson, 1998; Deming, 2010a; Deming, 2014; Dell, Mcdevitt, 2018)¹⁶. It certainly wasn't the first international and European convention in the anti-corruption sector. The OECD Convention was the consequence of the OAS Convention which was adopted a year earlier in Venezuela (Gantz, 1997; Henning, 2001)¹⁷. Both

¹⁶“OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions”, signed in Paris on 17 December 1997 and entered into force on 15 February 1998. 44 countries are part of it, 8 of which are outside the OECD area, namely: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Costa Rica, Denmark, Estonia, Russian Federation, Finland, France, Germany, Japan, Greece, Ireland, Iceland, Israel, Italy, Korea, Latvia, Lithuania, Luxembourg, Mexico, Holland, Norway, New Zealand, Peru, Poland, Portugal, United Kingdom, Czech Republic, Slovakia, Slovenia, Spain, United States, South Africa, Sweden, Switzerland, Turkey, Hungary.

¹⁷See the OAS Inter-American Convention against corruption, was approved in Caracas (Venezuela) on 29 March 1996, and entered into force on March 6, 1997, ratified by 35 countries in North and South America, namely:

conventions have partially adopted the matrix of the American FCPA. The OECD Convention allowed the export of the US model on a global level even outside the sphere of influence of the United States towards countries that were the main competitors of American multinational enterprises starting from the European continent (Breen, 2017).

The common objective between OECD and FCPA was the

Antigua, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Lucia, Saint Kitts, Saint Vincent, United States of America, Suriname, Trinidad and Tobago, Uruguay, Venezuela. “(...) The IACAC went much further than any other actual or proposed international agreement in seeking not only to make bribery of foreign officials a crime in the country of the exporting firm or individuals, but also in encouraging local governments to deal more effectively with the problem of domestic corruption (...). Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party (...)”. According to Henning: “(...) the item that may constitute the corruption is defined broadly as an article of “monetary value, or other benefit”. The expansive subject matter of the illicit exchange that includes any “other benefit” means that the underlying transaction should not be limited solely to economic exchanges, and the transfer may involve an intangible gain and not just money or property (...)”.

prohibition of corruption of foreign public officials. As the main road was the core of rules regarding illicit payments to foreign public officials and the anti-corruption provisions in the accounting books as fundamental in the fight against corruption¹⁸. The criminalization of the active subject of corruption remains the same in the international convention both for the corrupter and the corrupt¹⁹. Both OECD and FCPA maintained the international path of legal entities' responsibility as well as the conditions of the case which oblige states to introduce criminal liability for legal persons and acts of international corruption where criminal liability was incompatible with national law and provided for the related non-criminal sanctions which were equally effective²⁰.

As regards jurisdiction, the convention committed the states to adopt the relevant measures that were necessary for the establishment of jurisdiction in the corruption of a foreign official where the crime is also committed within their own territory, thus modifying the internal discipline of the repression of the phenomenon and obliging the signatory countries to

¹⁸Articles 1 and 8 of the OECD Convention and similar provisions contained in the FCPA, in 15 U.S.C. §§ 78m and 78dd-1 ff.

¹⁹Art. 1 of the Convention OECD and the parr. 78dd-1 ss, of FCPA.

²⁰See Artt. 2 and 3 of the Convention OECD and the parr. 78dd-1(a) ss. of FCPA.

determine jurisdiction in criminal matters where the countries were involved in the commission of the crime²¹. The regulations provided for the prosecution of citizens for crimes committed abroad where the convention established that the provisions were prosecutable²².

These provisions that were based in the FCPA have created a framework relating to anti-corruption provisions that were uniform on a global scale allowing for a level playing field between economic operators and fighting corruption (Raniere, 2019). This demonstration is part of the agreement where art. 5 committed the signatory countries to repress the relevant conduct with their own means and rules with broad autonomy according to the principle of sovereignty, thus influencing the national economic interest and the identity of the natural or legal persons who are involved and the effect for the repression of this type of conduct caused by relations with the state, especially foreign ones²³. The OECD Convention is the result of the legal transplant that came into force in 1999 and was ratified by the world economic powers among some countries that were not part of the

²¹Art. 4.1, 4.3 and 4.4 of the Convention OECD.

²²Art. 4.2 of the Convention OECD and parr. 78dd-1(g) and 78dd-2(i) of FCPA.

²³Art. 5 of the Convention OECD.

organization²⁴. The influence of the American system in the context of the international organizations has had a demonstrable result of the US supremacy in the control of the economy and the criminalization of international corruption on a global level (Laidi, 2019).

Council of Europe conventions in criminal and civil matters

After the OECD Convention, the process of criminalization of international corruption at a global level has influenced national laws as well as the Council of Europe with the aim of standardizing the laws of the adhering countries and with the attempt to transform national legislations to a single American model.

The Council of Europe, starting in criminal matters first and then following in civil matters, took a step forward by respecting the principles of the OECD Convention, the harmonization of the regulations of the countries adhering to a new regulatory nucleus that combats international corruption based on the FCPA of 1977 and the OECD Convention of 1997²⁵.

²⁴The Convention was also ratified by Argentina, Brazil, Bulgaria, Chile, Estonia, Israel, Slovakia and South Africa.

²⁵See the Criminal Law Convention on Corruption of the Council of Europe, Treaty no. 173, signed in Strasbourg on 27 January 1999, entered into force

The criminal convention highlights contractual obligations towards directions that are developed by US law²⁶ and by provisions in the aforementioned cases which also concerned accounting records.

The Criminal Convention, the prosecution obligations and, the specific cases are not included and/or consistent with the action to combat corruption between private individuals and the

on 1 July 2002 at the 14th ratification, today ratified by 48 States: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Belarus, Bosnia-Herzegovina, Bulgaria, Cyprus, Croatia, Denmark, Estonia, Russian Federation, Finland, France, Georgia, Germany, Greece, Ireland, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, North Macedonia, Malta, Moldova, Monaco, Montenegro, Norway, Netherlands, Poland, Portugal, United Kingdom, Czech Republic, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, Hungary. The Convention was also signed, but never ratified, not only by Mexico, but also by the United States of America on 10 October 2000. Furthermore, see the Civil Law Convention on Corruption of the Council of Europe, Treaty no. 174, signed in Strasbourg on 4 November 1999, entered into force on 1 November 2003 at the 14th ratification, today ratified by 35 States: Albania, Armenia, Austria, Azerbaijan, Belgium, Belarus, Bosnia-Herzegovina, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Greece, Italy, Latvia, Lithuania, North Macedonia, Malta, Moldova, Montenegro, Norway, Netherlands, Poland, Czech Republic, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, Hungary.

²⁶See Artt. 2-6, 9-11 of the Criminal Convention.

laundering of the proceeds of corruption as well as illicit trafficking. The criminal convention strengthens the fight against corruption by the states that are part of the Council of Europe²⁷. The criminal convention does not limit international corruption but commits the participants to the introduction of incriminating cases for national public officials and members who take part in parliamentary assemblies, thus addressing the issue of corruption of officials of international courts²⁸. Criminal conduct does not strengthen the corruption phenomenon by moving away from the regulatory focus in the FCPA and in the OECD Convention, constituting the repression of corruption of foreign public officials, policies in contrast with the transnational dimension which comes into conflict with domestic corruption apparently relevant in the economic context.

The political choice of the convention which aims to repress the corruption of foreign public officials is different in relation to corruption in general. The treaty models include the active and passive subject of corruption. The ICSE Convention has limited the scope of application of criminal sanctions, leaving the public

²⁷See Artt. 7-8 of the Criminal Convention and artt. 12-13 regarding trafficking in illicit influence and laundering of the proceeds of corruption.

²⁸Articles 2-4 of the Criminal Convention in the matter of national corruption and articles 5-6 and 9-11 regarding the international corruption.

official unfaithful²⁹. The Council of Europe was against it, following a relationship of cooperation and regulatory integration between the member countries. The Criminal Convention includes subjects where the conduct of commercialism foreseen as the illicit act of the corrupter and foreign officials are left exempt from the text of OECD following only some lines of FCPA³⁰.

²⁹Art. 1 of the OECD Convention and parr. §§ 78dd-1 ss.

³⁰Art. 5 of the Criminal Convention which provides: “(...) that each contracting country must criminalize active and passive corruption involving a public official of any other state (...)”; Art. 6 of the Criminal Convention, regarding corruption of members of foreign parliamentary assemblies, which provides: “(...) that each contracting country must establish as a crime the conduct of active and passive corruption involving members of public assemblies who exercise legislative or administrative functions of any other state (...)”; Art. 9 of the Criminal Convention, regarding corruption of officials of international public organizations, which provides that: “(...) each contracting country must criminalize active and passive corruption behaviors involving officials or employees of any public international or supranational organization or of any other institution of which the contracting countries are part (...)”; Art. 10 of the Criminal Convention, regarding corruption of members of international parliamentary assemblies, which provides: “(...) that each contracting country must criminalize active and passive corruption behaviors involving members of parliamentary assemblies of international or supranational organizations of which the adhering countries are part (...)”; Art. 11 of the Criminal

According to the principles of FCPA and the OECD Convention, the conduct is illicit and is aimed at maintaining a business or advantages in international economic transactions. This requirement is absent in the Criminal Convention where the promise and offer are considered prosecutable in a finalistic connection where the omission of the public agent is extraneous to the advantages of an international economic transaction³¹. In the OECD Convention, countries are committed to legal provisions where corruption is oriented towards the interest of the entity that has benefited and has called upon individuals who hold top positions to respond to the order of the governance of the entity when its supervision has allowed corrupt conduct³².

The criminal policy between the two conventions is also distant. On the one hand, the American model since the scandal period has been oriented towards the repression of the illicit conduct of

Convention, on the subject of corruption of judges and officials of international courts, which provides that: “(...) each contracting country must establish as a crime the conduct of active and passive corruption involving officials of judicial offices or international courts whose jurisdiction is accepted by the contracting parties (...)”. See also Art. 1 of the OECD Convention and parr. 78dd-1 ss. of FCPA.

³¹Art. 2 of the Criminal Convention. Art. 1.1 of the OECD Convention and parr. 78dd-1(a) ss. of FCPA.

³²Art. 18 of the Criminal Convention. See also Artt. 2 and 3 of the OECD Convention and §§ 78dd-1(a) ss. of FCPA.

multinationals. On the other hand, the European model has been influenced by the European one aiming at the harmonization of internal regulations regarding national corruption³³.

The OECD Convention attempts to safeguard the correctness of international economic transactions where the national dimension and corruption of entities are relevant given that the Criminal Convention of the Council of Europe harmonizes national policies³⁴. The trafficking of influence in a marginal manner is focused on the commercialization of the function committed by the official. The strengthening of anti-corruption policies has as its objective the greatest number of forms of demonstration which is not concentrated on international corruption and where the text of the agreement is linked to the protection of market interests. The indictment concerns the conduct that follows any undue advantage and is absent from constitutive elements where the connection of the conduct obliges the adhering countries to provide for the prosecution of passive corruption. The conduct of the foreign public official also remains in contrast with the spirit of the OECD Convention.

It is noted that the text under investigation follows on the one hand domestic corruption and on the other hand the objectives of

³³Art. 19 of the Criminal Convention. Art. 5 of the OECD Convention and parr. 78dd-1(a) ss. of FCPA.

³⁴Art. 17 of the Criminal Convention and Art. 4 of the OECD Convention.

protecting the transparency and loyalty of the decision-making process regarding the public administration to which the unfaithful official belongs. It complies with domestic legislation and is seen as an element that is considered the starting point for preventing international corruption. The conventional text specifies the criminalization of the passive corruption of the foreign public agent who pursues the purpose according to the basis of the case and the correctness of international economic operations, thus aiming to extend the transnational case for the protection of the legal good of domestic corruption. Thus an innovative element is constituted which respects the OECD Convention and is also apparently capable of offering the fight against international corruption in a preventative way and on the other hand presents itself as a critical element, visible in the internal regulations on the subject, thus tending to bring together two criminal figures where the transnational manifestation originates from and is related to domestic corruption.

As can be understood, the pure, clear and precise non-distinction between internal and international regulations on the matter show a certain ineffectiveness of the protection which is linked to a second interesting element, namely the prosecutability of the passive corruption of the foreign public official. In abstract terms, this results in an increase in the effectiveness of the

regulatory provisions, thus generating the prosecutability and ineffectiveness of the provisions. The abstract and greater protection elements risk producing opposite effects given that national systems may have a political-institutional interest that is contrary to the pursuit of international corruption involving government public officials as well as positions in the public administration of a foreign state.

The animus of the Criminal Convention imposes in a broad and severe manner the text that effectively addresses the repression of the phenomenon and the internal dimension as well as its transnational manifestation. The relative “success” even outside the US as actions to combat the phenomenon of international corruption for multinational enterprises differs from the judgment on regulatory provisions in an abstract way respecting the suitability of being effective for the precise application. By overcoming the American model through the Council of Europe conventions, we can also see the first results that weaken the model that was adopted by the OECD, thus allowing the US an expanded, indiscriminate terrain in the principles of the FCPA in the fight against international corruption of foreign and European multinational enterprises/corporations.

The EU Convention

Only in 1996 within the EU did we see an attempt against European corruption through the first Protocol on the protection of the Union's financial interests which committed: “(...) states to introduce effective, proportionate and dissuasive criminal sanctions against public officials who solicited or received advantages of any nature, to carry out or omit acts, in a manner contrary to their official duties, harmful or capable of damaging the interests of the Union (...) to protect community interests, and also including the commercialization of the public function of community functionary, were mostly aimed at the uniform repression on a European scale, but mostly of domestic or in any intra-community corruption case, once again identified as the main target of the discipline in the matter, therefore with limited scope of transnationality (...)”. The subsequent Additional Protocol on the liability of legal persons, adopted to complete the protection explained by the first Protocol, is moving on the same basis, i.e. it is aimed exclusively at intra-community corruption and to the detriment of the interests of the Union, excluding instead the typification of an extensive conduct aimed at repressing corruption of foreign public officials³⁵.

³⁵Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests, OJ C 221, 19.7.1997, p. 11-22.

Months later, the Convention on the fight against corruption was approved, i.e. a convention involving officials of the European Union or Member States of the EU³⁶. This is not a text with sensational innovations as regards the scope of application of the obligation to incriminate and above all the corrupt conduct that harmed the interests of the Union. The relevant Convention of the EU, unlike the previous Protocol, committed the states: “(...) to sanction corrupt conduct involving *sic et simpliciter* public officials of the individual countries adhering to the Union, or of community officials, regardless of the effects that the corruption causes or is likely to cause in the financial interests of the Organization (...)”. It expands the catalog of legal assets protected by the provision, since by eliminating the link with financial interests, the EU Convention obliges states to offer criminal protection to the regular functioning of the administrative apparatus of the Union. It definitively demonstrates the awareness on the part of European governments that corruption increasingly presents transnational elements and, at the same time, constitutes an element of concern for the

³⁶The convention relating to the fight against corruption in which officials of the European Communities or of the Member States of the European Union are involved was adopted by Council Act of 26 May 1997 (in Official Journal no. C 195 of 25/06/1997, pp. 2-11), and came into force on 28 September 2005.

economic community and European institutional framework, lacks the economic matrix and vision, so that, like what was observed for the Criminal Convention, the intent to repress the infidelity of the national or community public agent is prevalent, rather than the active conduct of the international corrupter, detrimental to general economic and market interests.

Corruption between private individuals was an important subject of criminalization as is also noted in the Framework Decision 2003/568/JHA with which the Member States: “(...) called upon to introduce incriminating cases which punish those who solicit or receive undue advantages for the purpose to carry out or omit an act in violation of one's duties, and equally the active conduct of the corrupter, also expressly providing that the legal persons in whose interest the conduct occurred may be held accountable for the crime, or where it also occurred due to the failure to supervise on their part, in a manner entirely similar to that established in the Criminal Convention (...)”³⁷. In particular, art. 7 of the Framework Decision provides: “(...) that states recognize their jurisdiction not only where the conduct took place entirely or partly in the national territory, but also when it is committed abroad by one of their citizens, or for the benefit of a legal person

³⁷Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192, 31.7.2003, p. 54-55.

having its head office in the territory of a Member State (...)”. The aforementioned provisions regarding jurisdiction are susceptible to reservation, at the discretion of the states, thereby effectively relegating such provisions to domestic application, or potentially jeopardizing the introduction of provisions of general scope and effectiveness.

Differently from public corruption which was regulated by the EU Convention, the transnational dimension of private corruption is enhanced in the Framework Decision. The critical profiles relating to the rules on jurisdiction are structured according to the philosophy of the incrimination obligations and are directed towards a broader and not as concrete repression as in the European context where corrupt conduct in the private sector (of European and foreign companies) are relevant and concern each Member State within the spirit of private corruption where the Framework Decision and the corrupt conduct concern a subject also of non-European law. Within this profile we note the illogicality between the disciplines of the Union in relation to corruption in the public and private sectors as well as the contradictory nature that respects the preambles and the general spirit of the Framework Decision.

The scope of application in relation to private corruption is very broad given that the criminalization of the commercialization of

national officials and of the Union punishes corruption between private individuals. The theory of comparability between private corruption and that of the public sector, where the regulation is more stringent and which respects the rules on corruption of public agents, is contradictory. These are symptomatic aspects that have to do with diversity that characterizes the unreasonable timidity and the lack of political will that fights the most serious forms of international corruption of multinational enterprises and that benefits companies on the global market.

Opportunism and timidity are the basis of the lack of jurisdictions in the European conventions. In terms of the laws a certain discrepancy has been noted in the provisions as well as in the enforcement system.

In the following years, yet another step took place with the PIF (Protection of the Union's Financial Interests) Directive which committed states to criminalizing the corruption of (foreign and not) European public officials and provided common definitions on offences against the EU budget. The timidity of the enlargement in the scope of application of the anti-corruption provisions of European origin are likely to include subjects subjected to criminal sanctions for conduct of international corruption where national public officials and of the Union as well as abstractly public officials from countries other than the

Member States are the authors of the active conduct³⁸.

The European Directive committed the Member States to extend the criminalization relating to corrupt conduct involving foreign public officials as well as the ideal border up to the precise observation of the European provisions on corruption which represents the territorial margins of the Union. The law does not go so far as to criminalize the corruption of foreign public officials tout court but is limited to the sphere of application of the forms of manifestation of the corruption phenomenon that harm the financial interests of the Union. Thus there is an expansion of criminalization towards forms of corruption which are coefficients towards transnationality. Extreme prudence is thus manifested in the European context towards provisions that oblige states to provide for active and passive corruption of foreign public officials.

EU has shown a willingness to respect intra-European corruption policies with relative severity and rigor. An above all political will towards international corruption which preserves margins of corruptibility of the foreign official with the aim of not interfering with the foreign affairs of multinational enterprises of the old continent where EU law remains excluded from the

³⁸Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, p. 29-41.

instruments of fight against corruption as a good probability in degree of constraint that hardly reaches the margins of impunity. The consequences of economic consolidation of the successful company show an improper benefit if another company operating in the European market is excluded due to corruption. The effects of the market are expressed both at the international and at the internal level of the Union. Union's perspective was approached to anti-corruption policies in relation to the manifestations of the transnational phenomenon. This is a never-ending and continually developing challenge at European level.

The UN or Merida Convention

The Convention against transnational organized crime dates back to 2000 from the General Assembly of the UN, which provided for the obligation to prosecute active and passive corruption, inviting states to evaluate the possibility of extension to conduct involving corruption of foreign officials³⁹.

³⁹See, the United Nations Convention against transnational organized crime, approved by United Nations General Assembly Resolution A/RES/55/25 of 15 November 2000, entered into force on 29 September 2003, and according to art. 8: "(...) an obligation to criminalize the active and passive corruption of public officials, also inviting the adhering states to evaluate the opportunity to make the corrupt conduct of foreign public officials

This is not a binding indictment given that it is referred to countries that are adhering to the possibility of evaluating the opportunity to include forms of manifestation of the corruption phenomenon among the conducts that are criminally punishable under the rules of the respective systems. The discretion formula has achieved the obligation to put illicit international corruption on a global scale to overcome within the scope of the UN the temptation of the legal transplant that has been unsuccessful since the seventies. The organization returns to play an active leading role in the fight against corruption through the adoption of the Convention against transnational organized crime, giving a new impetus to the process of criminalization of international corruption which finds safer foundations further down the line.

The UN General Assembly approved the United Nations Convention against Corruption (Merida Convention or UN Convention) on 31 October 2003 thus presenting the corruption of foreign public officials as a central part of the prosecution obligations that bind the adhering countries (Carr, 2006; Rose, Kubiciel, Landwehr, 2019). The Convention is based on three objectives and has as its main objective to achieve the strengthening of conflicting measures for the suppression of corruption while at the same time consolidating international

criminally punishable, like domestic corruption (...)"

cooperation and improving policies that concern the integrity of public officials. Its central core are the provisions on incrimination, identification and repression of illicit conduct. The obligations to prosecute transnational or domestic corruption contain provisions regarding cases such as money laundering, abuse of office, credit and corruption between private individuals. The text of the agreement aims to regulate these collateral cases in the matter⁴⁰. The Merida Convention included the Criminal Convention of the Council of Europe, sharing the choice of criminalizing passive corruption of foreign officials on an equal footing with active conduct⁴¹.

In particular, Art. 16, par. 1 of the UN Convention states that: “(...) each state party adopts the legislative and other measures necessary to confer the character of a criminal offense, when the acts have been committed intentionally, to the fact of promising, offering or granting to a foreign public official or an official of an international public organization, directly or indirectly, an undue advantage, for himself for another person or entity, so that he performs or refrains from performing an act in the exercise of his official functions, in order to obtain or maintain a commercial activity or another undue advantage in relation to international

⁴⁰See Artt. 15ss of the Merida Convention.

⁴¹See Artt. 16ss of the Merida Convention.

trade activities (...) and in par. 2: “each state party shall consider the adoption of legislative or other measures necessary to confer the character of a criminal offense, when the acts were committed intentionally, on behalf of a foreign public official or an official of an international public organization, to solicit or accept, directly or indirectly, an undue advantage for himself or for another person or entity, to perform or refrain from performing an act in the exercise of his official functions (...)”.

As can be understood, the non-prosecution of passive conduct among the binding provisions is linked to the need to avoid the related contradictions between domestic law and *lex loci*. This is a typical case where the prosecutable subject of a foreign jurisdiction in the figure of the foreign public official and the basis of national law do not have the public qualification which is not punishable. Thus the investigation is oriented towards a common element where the conventional texts of the UN have in common the clause safeguarding the sovereignty of states.

Thus we can say that the Merida Convention constitutes the first interstate agreement of authentic and global extension for the fight against corruption, as a phenomenon with a global vocation that is detached from the economic perspective. Like that of the OECD, within itself remain all the traits that characterize the type of crime and which elevate as a witness a regulatory path that is

characterized as long and painful.

The passive corruption of the foreign official appears to be evident for the purposes that improve national policies concerning the integrity of officials, the protection of market interests and, free competition between companies operating in the globalized economic context. The relevant Convention provided for the adoption of necessary measures to sanction the crimes of commercial conduct of the public agent. Unlike the criminal convention, the Merida Convention remains stable as regards economic interests and the choice to criminalize the passive corruption of the foreign official does not constitute a real binding obligation for the states that are called to take into consideration the possibility of criminalization of the passive conduct of the public agent (Arnone, Borlini, 2014)⁴². Active corruption for acceding countries has called the provisions that establish the criminal illegality of the corrupt conduct of the

⁴²According to Arnone, Borlini: “(...) the Ministers were convinced that the fight against corruption should take a multidisciplinary approach and that it was necessary to adopt appropriate legislation in this area as soon as possible. They expressed the belief that an effective fight against corruption required increased cross-border cooperation between states, as well as between states and international institutions, through the promotion of coordinated measures at European level and beyond, which in turn implied involving states which were not members of the OECD (...)”.

foreign official, i.e. the prosecutability of passive conduct in relation to the free determination of individual states as seen in the treaty text. It is clear that the public perspective is predominant in the criminal convention and inspires and prevails in the context of the provisions contained in the UN Convention as is also evident in an original way from the OECD Convention for the protection of competition and the market.

The publicist conception has respected the market perspective which considers the structure of the Criminal Convention in a unique way and which respects the OECD Convention where there is an overall consolidation of the protection of public interests thus combining the protection of market interests. The basis of the process of criminalization of international corruption consolidates the UN Convention which also finds obligations of a global nature by establishing effective criminal sanctions against the corrupting agent of the foreign public official even if it is a corrupter, natural or legal person⁴³.

⁴³Art. 26 of the UN Convention affirms that: “(...) each acceding country adopts the necessary measures in order to establish the responsibility of legal persons who “participate” in the crimes established in accordance with the text of the agreement, whether of a civil, criminal or administrative nature, and also invites states to ensure that applied and applicable sanctions, whether criminal or non-criminal in nature, are effective, proportionate and dissuasive, including sanctions of a pecuniary nature

By carefully reading the provisions offered for international corruption in the conventions referred to above we can understand that the main point of reference was the FCPA regulation which has some differences compared to the original model, thus allowing us to grasp the differences between the various models with some provisional ones regarding the possible causes of disappointing results in terms of effectiveness which identifies the correspondence with internal provisions introduced to modify the international conventions ratified over time by the member countries of the Union.

Some comparative criticisms in the conventional models under investigation

The FCPA was the first point of integration towards the criminalization of international bribery as a regulatory instrument that sanctioned the bribery of foreign public officials for a multinational enterprise. Public officials are fought through rules based on domestic corruption.

The export model, that is the American one has not followed a path of easy harmonization by various countries despite the awareness that the criminalization of international corruption

(...)"

could have a negative influence on national businesses. The American impulse and international conventions are inspired with the aim of repressing corruption even at a transnational level.

The global framework noted that the provisions are not effective and are distanced from the conventional elements of the original model. The strengthening of policies in the area of international corruption shows the weakness of different provisions to a multi-level protection of interests as well as the requirements of prosecution, the policies of national legislators which were divergent.

The obligations of incrimination and the legal transplant are traces of a varied and imprecise legislation often where the punitive will of the state is contradictory. We think of the notion of public agent between different conventions which involves precise terms as well as the consequences of the subjective element in terms of specificity.

The lack of a single model against international corruption has a side effect and causes prosecution obligations. The national legislator ends up regulating the codification of the incriminating case of an international nature. The multilevel perspective of different binding conventions for different groups of adhering countries leads to replicating the internal provisions on domestic

corruption of transnational conduct.

The different anti-corruption models have the consequence of encountering in various cases, not all of which are precise, leading towards international corruption, thus offering a level of protection to a legal asset at stake. The differences are oriented towards a procedure for applying the sanction where the guarantees are recognized while in the US reality it is only a type of negotiation such as for example the provision of the nature of the procedure. The characteristics of the global framework and national legislations are moved within a system of criminalization of corruption of foreign public officials.

Incriminating cases. The monosubjective structure

The construction of the incriminating case as a case of corruption is relevant for the synallagmatic relationship between the corrupter and the corrupted person which is part of the codification of the crime through the introduction of a multi-subjective nature from multiple single-subjective cases.

Already in the OECD Convention, the commitment for countries to criminalize international corruption with the single-subject case, offering a promise of undue sums and/or advantages to a

foreign public official⁴⁴, has been noted. The conduct in the conventional system is directed towards the adoption and/or omission of an official act where the acceptance of the public official is verified by a possible fulfillment which requires its fulfillment from the corrupter, which does not include the minimum characteristics concerning a multi-subjective case. The need to expand the success of incrimination in the face of foreseeable difficulties allows, starting from the OECD Convention that followed the FCPA, the relative prohibition on the conduct of the corrupter. The American text has excluded criminal relevance and the foreign public official is involved in corruption. The related prohibition has to do with the promise, offer and bestowal for a person who engages in the relevant conduct. Active and passive conduct is reserved by two different provisions which individually describe their own cases which construct the single-subjective cases. Articles 2, 3 and 5 of the Criminal Convention refer to the conduct that describes the unitary nature of the structure of the case⁴⁵. The Council of Europe has already stated that these are mirror-image, converging conducts which are considered as different cases, prosecutable and independently of each other⁴⁶.

⁴⁴Art. 1 of the OECD Convention.

⁴⁵Artt. 2, 3 and 5 of the OECD Convention.

⁴⁶See par. 32 of the Explanatory Report to the Criminal Law Convention on

The criminalization of foreign official's passive conduct distinguishes the criminal from the OECD Convention by expressing the public nature of an economic nature in the European matrix. The EU Convention commits states to sanction the conduct of the corrupter as well as the conduct of the unfaithful public official, both national and community⁴⁷. As regards the EU Convention, the provisions assume that individual cases are of a monosubjective nature. Passive and active corruption is classified as conduct that criminalizes the corresponding regulatory provision of a conventional nature. States introduce incriminating cases of an autonomous and single-subjective nature⁴⁸ despite the fact that the conventional text refers to cases which are classified as crimes and that each as an autonomous case confirms the single-subjective approach⁴⁹. The UN Convention commits the adhering countries to provide for the crime of corruption as an assessment of international crime where passive corruption is evident, distinct from the hypothesis of crime⁵⁰. An exception from this context is the Criminal Convention for the codification of international

Corruption, of 27 January 1999, p. 7: <https://rm.coe.int/16800ccec44>

⁴⁷See Artt. 2 and 3 and 4 of the EU Convention.

⁴⁸See Artt. 2, par. 2 and 3, par. 2 of the EU Convention.

⁴⁹See Art. 4 of the EU Convention.

⁵⁰See Art. 16 of the UN Convention.

corruption as a single-subject case. This is a model where the underlying provision is a single-subject case which is established by the OECD Convention. A model that incriminates the case of corruption as conduct that from an active and passive point of view is linked to a single fact of an illicit nature.

International passive corruption and its criminalization

From the previous paragraphs we have also understood that the criminalization of international corruption has the objective of giving a moral impulse to the foreign conduct of the multinational enterprise, as passive corruption foreign to the original objectives of the incriminating case.

FCPA and OECD Convention are inspired by the obligations of incrimination of the conduct of the public agent as a basis that finds its repression within the origin of the official⁵¹. The Council of Europe has forced its member countries to sanction passive international corruption, observing that the obligation to incriminate, unlike the EU Convention, takes into consideration a public official of a foreign state, i.e. an action that is limited to the contracting parties⁵².

⁵¹See Art. 1, par. 1 and par. 2 of the OECD Convention.

⁵²Art. 5 of the Criminal Convention which requires adhering states to adopt the legislative measures necessary to punish as a criminal offense corrupt

The OECD Convention protects the integrity in the public sector and is irrelevant to cases where the relevant structure guarantees the protection of competition between companies in the international market. The criminalization of passive conduct is placed in the inspiring perspective of the OECD Convention where transparency and correctness in the decision-making process, especially in the sector of foreign public administration, is not an exclusive and national affair in the globalized economic context which characterizes without borders the action of multinational enterprises⁵³.

The protection of public interests according to the Criminal Convention is limited to a conduct capable of damaging the impartiality and good performance of the administrative apparatus of the Union as shown by the Convention of the EU where the states are called to criminalize such active conduct as well as international passive corruption. The criminalization of passive corruption only for national officials as well as those of the Union does not exclude the application of the obligation to prosecute non-European corruption. The Fraud Directive harms the interests of the Union. The provisions of the criminal convention have extended the obligation of incrimination for the

conduct involving a public official of any other state.

⁵³See parr. 47 and 48 of the Explanatory Report, op. cit.

countries of the EU towards public officials, including non-European ones, who are entrusted with work that affects the interests of the Union⁵⁴.

The UN Convention is not so risky, on the contrary it appears more cautious and concrete. The obligation to criminalize active international corruption as well as the Merida Convention makes the criminalization of passive international corruption optional and not mandatory, thus arriving at a mediation between the perspective of the OECD Convention and the Criminal Convention for some states such as the United States⁵⁵. Thus two models are presented that respect the approach that contains the OECD and the Criminal Convention which is exempted from the passive conduct of the foreign public official. The diversity of the provisions clearly renders evident a multi-level protection model which transmits the massive fight of a corruption nature, creating in such a way disagreements regarding factual decisions.

Description of the fact

The corruption phenomenon in recent years, with the advancement of technology, especially in the public sector,

⁵⁴See Art. 4 of the Directive (EU) 2017/1371, op. cit.

⁵⁵See Art. 16 of the UN Convention.

introduces characteristics that make the conduct of commercialism elusive to the incriminating cases of a classic nature on the exchange capable of proving behaviors that risk escaping the typical traditional understandings of the past.

The major model is that brought by the FCPA and the OECD Convention. Especially, Art. 1 of the Convention affirms that: “(...) each party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business (...)”.

Therefore, the fact of: “offering, promising or giving any undue sum or other advantages to a foreign public official (...) in the performance of official duties and for the purpose of obtaining or maintaining business or other improper advantages is established as a crime in the context of international affairs (...)”. The perspective coincides with the text of the OECD and the inspiring US model. Reading the two provisions in comparison allows us to see the nature of the FCPA which contrasts with a

broad and general description of the OECD Convention. The OECD Convention is not limited to the specific ways of prosecuting illicit conduct and proposes criminalization for the person who “(...) offers, promises or provides the bribe in any way”, thus registering an expansion of the case compared to the American model (Kang, 2023).

In the text of the agreement the pecuniary nature is qualified as undue without being provided in the FCPA that it is necessary to demonstrate the pecuniary nature. The conventional provision is rigorous and extends the type of patrimonial or non-pecuniary advantage, coinciding with the price of the crime. The severity of the case has to do with the recipients of the corruption when the political parties that facilitate third parties are expressly included in the agreement. The text of the Convention provides for the criminalization of competitors including facilitators especially from political party channels. The OECD Convention does not exclude that criminal relevance through national laws and the provisions introduced according to the convention depend on the notion of public function, i.e. as a function that each candidate or political party expresses according to national provisions⁵⁶.

⁵⁶See Art. 1, par. 2 of the OECD Convention which is affirmed that: “(...) each party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offence. Attempt and

Thus the typical role of intermediaries is “created”. Both texts allow that the criminalization of corruption of an “indirect” nature is committed between a third party who acts between the corrupter and the foreign public official. The text of the agreement is stringent according to the American model while it limits itself to requiring proof concerning an offer. The promise or gift is believed to be of interest to the public agent where the OECD Convention demonstrates that corruption is effectively addressed among the triangulation created with the consent of these⁵⁷.

This is not a semantic or terminological difference but an option that is relevant in terms of evidence. The OECD Convention demonstrates through the principle of determinacy that it risks demanding judicial verification as an evidentiary standard where the factual context operates between the intermediary and making the connection between the briber and the foreign official

conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that party (...). See also the Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, § 16, p. 12.

⁵⁷15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3): <https://www.law.cornell.edu/uscode/text/15/78dd-1>; Art.1 of the OECD Convention.

less visible.

The choice of the OECD Convention from an evidentiary point of view demonstrates in a synallagmatic way that the relative risk of producing effects that respect the purpose pursued by the case is not convincing and it requires proof that is difficult to reach in court due to the peculiarity of the transnational conduct (Leader, 2015).

The effect of the illicit conduct causes the performance of the public agent's function. In the FCPA, the commercial function assumes in the conduct a judgment of suitability of the acts that produce what is required by the provision. Illegality is suitable for: “(...) influencing an act or decision of the officer within the scope of his powers, or to induce him to carry out or omit an act in violation of official duties or in such a way as to ensure an undue advantage or finally to induce him to use his influence with a foreign government or its branch to “affect or influence” an act or decision of the latter (...)”⁵⁸.

Declinations of the conduct are absent within the scope of the OECD Convention which valorises the function of the foreign agent in a unique way, excluding that the constituent elements of the crime are part of the subjective element. In the OECD

⁵⁸15 U.S.C. §§ 78dd-1(a)(2)(A) and (B), 78dd-2(a)(2)(A) and (B), 78dd-3(a)(2)(A) and (B).

Convention the public official acts in a context where official duties constitute the main purpose of the agent⁵⁹.

It is underlined that the purpose does not express the hypothesis of an act being performed, it omits the provision that emerges from a specific official act. In this sense it does not seem to be excluded that the reconcilability of the OECD Convention together with corruption uses the exercise of function⁶⁰.

The OECD Convention is broad in the regulatory context which sanctions corrupt conduct when any type of commissive or omissive initiative by the public agent occurs, while in the system of the FCPA the violation of official duties is attributed as expected. The conventional provision requires the agent's presentation linked to the type of fulfillment of the duties of the official and without confining the case to corruption by contrary act since in the text there are no references to the violation of official duties (Zerbes, 2014). The American discipline sanctions

⁵⁹Art. 1, par. 1 of the OECD Convention.

⁶⁰15 U.S.C. §§ 78dd-1(a)(2)(A), 78dd-2(a)(2)(A), 78dd- 3(a)(2)(A), which affirms the hypothesis of “securing any improper advantage” and Art. 1 of the OECD Convention, which requires that: “(...) the foreign public official “act or refrain” for whom takes action as a consequence of corruption, with active or omissive conduct, in pursuing, but also in preserving the economic interests of the corrupter, for example by maintaining a favorable decision already taken, in the traditional scheme of subsequent corruption (...)”.

the influence that corrupts it as it is exercised by the public agent and within the scope of its duties recovers ground respecting the scope of application through the spirit of the OECD perspective. However, in the provision of the FCPA the sphere of influence that the public agent exercises on foreign public entities does not mention the text of the agreement which makes references to third countries which are recipients of the corruption.

The OECD Convention is incisive in American regulation as well as in the perspective of easy adaptation within foreign jurisdictions of its case models. This confirms the contractual indications relating to the implementation of the incrimination obligations which commit the states to the equivalence of the internal provisions and in this case of the convention. The transposition of the American perspective into the conventional text as well as the needs for political mediation and legal technique have created a reduction in the levels of precision of the cases with the aim of making common commitments transposable into domestic legal systems. The text of the Criminal Convention regarding the description of the standard fact appears to be superimposable with the perspective that is implemented through the OECD Convention. The differences concern the subjective element and the provision contained in the OECD Convention, thus assigning a task of selecting behaviors

that are criminally relevant⁶¹.

It is understood that the influencing attitude of the agent in carrying out the public function is addressed differently in the two treaty texts. In the Criminal Convention the agent has the objective of causing the action or omission of the foreign public official in his functions and in the acts that result from his office according to the spirit of the OECD Convention allowing a broad criminalization which is connected with the duties of office without considering omission within the scope of the function exercised by the public agent. Differently from the OECD Convention, the Criminal Convention does not include in fraud the incriminating case of the behavior of the public agent who benefits the corrupter while respecting the scope of his duties.

Part of the conduct excludes the formulation that tightens the intent of the Criminal Convention which falls within the incriminating case relating to the trafficking of illicit influences which the convention obliges the states to introduce into their respective systems⁶². The EU Convention overlaps the text of the Criminal Convention.

The EU Convention appears quite different in relation to the terminology of the qualification of the advantage, granted to the

⁶¹Art. 1 of the OECD Convention: “(...) in order to obtain or retain business or other improper advantage in the conduct of international business (...)”.

⁶²Art. 12 of the Criminal Convention.

foreign public official according to the Criminal Convention which assumes an advantage which is not noted in the EU Convention and actually protects the public interests of the Union by directing the covenantal choice towards a broad and varied notion.

The EU Convention provides a subjective element that is relevant to conduct “in compliance” and in “violation” of official duties. The specific model identifies the EU Convention and imposes the criminalization of the active conduct which has the objective of causing the commissive or omissive behavior of the public official in compliance with their official duties within the scope of their functions according to the behavior that does not comply with official duties. The wording of the case does not seem to differentiate the Criminal Convention that the generic reference is present to one's exercise of functions. Instead, the EU Convention sanctions corruption that is connected with the exercise of the function. According to the text of the agreement it assumes criminal relevance both for the giving and the promise that the conduct complies with official duties when it is connected with non-compliant conduct to official duties in carrying out the functions of a public agent.

The criminal relevance of conduct that is contrary to official duties is excluded. This also excludes the scope of the function

not considered in the Criminal Convention but included in the definition of the OECD Convention. The three texts of the conventions describe, we can say, three different concentric circles of criminal relevance where the Criminal Convention is less extensive while the OECD Convention represents the broadest.

However, the provisions from a factual point of view present a unitary model. We can say the same spirit for the UN Convention where, like the Criminal Convention, it provides for the criminalization of the promise, offer and giving of an “undue advantage” to a foreign public official. The UN text ignores the differences in wording in the description of the typical fact and broadly reproduces the model of the Criminal Convention as it is not dissimilar to the OECD Convention which shares the limitation of application to corruption relating to international trade.

We can say that the UN Convention as well as the OECD Convention are of an equal level which place the attention of the conduct oriented towards causing commissive and/or omissive behavior of the foreign public agent which is connected with the exercise of the “duties” of office. This element differentiates and broadens the field of application which respects the Criminal Convention where it refers in a unitary way to the exercise of

“one's function”. The conduct appears to converge to a certainly unitary model of typical case where the terminological difference is used to describe the effect of the active corrupt conduct and is not without importance given that the scope of one's exercise of the function appears to include the catalog of the duties deriving from the office which burden the public agent even outside his sphere of competence.

The expression used in the UN Convention: “(...) in the exercise of his or her official duties (...)” appears to be more or less repeated in the OECD Convention when it is stated that: “(...) in relation to the performance of official duties (...)” as can be read in the comparison between the latter and the Criminal Convention. Here too we can understand that the criminalization of conduct and the “weak connection” with one's official duties has a susceptible nature that it absorbs the case of trafficking in illicit influence where the UN Convention requires the introduction into the legal systems of the countries that do part⁶³.

The UN Convention includes among the taxable subjects the officials of international public organizations who are excluded from the European text in question. This is not a lack of protection considering that the function is adequate according to the Criminal Convention which commits states to criminalize the

⁶³Art. 18 of the UN Convention.

corruption of officials of international organizations, international parliamentary assemblies, judges, officials of international courts⁶⁴.

Both conventions, with some peculiarities, describe a unitary model of description of the crime which confirms a starting point for multilateral and multilevel protection of international corruption. The scope between the two conventions is different as regards the corruption of officials of international public organizations and above all as regards the subjective element.

The OECD Convention presents as maximum criminalization the criminal relevance of payments, i.e. behaviors that are exogenous to the scope of the official's powers. The choice of the UN Convention is certainly considered as a step forward with regards to offensive criminal behavior and which constitutes a step backwards in relation to the repression of corrupt conduct where the conventional management model conflicts with the OECD Convention.

The Criminal, OECD and UN Conventions are oriented towards a case that punishes the promise, offer and, giving which is carried out with any form of an undue advantage, thus identifying the free form model with the qualified object. This model is unique with the EU Convention which does not include the offer

⁶⁴Artt. 9, 10 and 11 of the Criminal Convention.

among the illicit conduct but actually expands the advantages which are susceptible to criminal prosecution and which does not require them to be classified as undue.

(Follows): The subjective element

As regards the subjective element, the international legislator with the relevant models has given a significant message with the task of following the selection of criminal behaviors, excluding many others from the scope of application of the case. The model of the OECD Convention and the UN Convention constitute a subjective, effective, structured, articulated element which constitutes a dual purpose of a competitive nature while simultaneously allowing the case of the relevant type to be integrated in a concrete way.

The EU Convention and the Criminal Convention are more stringent regarding the behavior of the public official as a corrupter which is common to the texts examined.

We repeat the same terminological expressions that we also reported in the previous paragraph, i.e.: “in relation”, “in the exercise”, “in accordance” as points of investigation for the selection of the behaviors in the specific case. Expressions that limit the protection of behaviors that fall within the sphere of

competence of the agent by expanding the protection that includes all behaviors of the function concerning official duties and its related behaviors. This is a plurality of protection models that concern the skills of the foreign public agent, including weak behaviors that are connected with the exercise of official duties.

The formulation of the provision does not require the official act, the action or omission of the public agent which is noted in the conventional model, as factors that assume a degree of constitutive elements of the crime. Thus, the specific intent that includes and forms the active conduct and which is evident from the agent's perspective is characterized in a unique way where the conviction and will disturb the function and duties that the public official exercises to cause active behavior and/or omitted without assuming relevance and without verification⁶⁵.

The rule does not require that the agent implicitly and explicitly confirms the existence of an agreement between the parties which is sufficient in the context of the Criminal Convention, and the public agent is aware of the payment and the purpose of the same⁶⁶. The objective of the provision is to sanction a conduct in the absence of acceptance by the public official which can also be demonstrated by objective circumstances such as the will of

⁶⁵See par. 32 of the Explanatory Report, *op. cit.*

⁶⁶See par. 36 of the Explanatory Report, *op. cit.*

the agent⁶⁷. Thus the conventional texts seem to refer to a single model which does not attribute to an agreement but anticipates the protection of the payment, the offer or the promise and, the intentions which are irrelevant and related to the foreign public official.

The FCPA appears to anticipate the protection of a conventional model since it acquires a criminal nature in the American context even where the purpose of influencing the decisions of the public official causes active or omissive behavior, i.e. an attitude that seeks to expand the boundaries of the anti-corruption provision⁶⁸. The choice to limit the prosecution of such a (active) conduct, has the purpose of influencing and/or causing the unfaithful behavior of the public agent when the latter does not systematically convince the regulatory contexts, such as the OECD, the Criminal and the UN Conventions. In such a case the advantage of the public agent is classified as undue.

This requirement performs the function of selecting behaviors that are offensive to the legal good which risks constituting a useless procedural limit where in the absence of other indicators ends up requiring negative proof of the presence of other

⁶⁷See par. 198 of the Legislative Guide for the implementation of the United Nations Convention against corruption, op. cit.

⁶⁸U.S.C. §§ 78dd-1(a)(1)(A)(i)-(2)(A)(i)-(3)(A)(i), 78dd-2(a)(1)(A)(i)-(2)(A)(i)-(3)(A)(i), 78dd-3(a)(1)(A)(i)-(2)(A)(i)-(3)(A)(i).

purposes. The economic relationship of the private individual with the public entity is independent if it is a natural or legal person. This kind of relationship that exists between the individual and the administration but not necessarily with the official in person has to do with the payment of a sum of money to some multinationals operating in the oil sector, to the energy minister of a country that is rich in hydrocarbons, or by some companies operating in the fruit import sector, to the president of the republic who has introduced high taxes in the export sector of agricultural products and/or to a multinational which operates in the infrastructure sector, to the transport minister of an African country who has launched a tender for a highway, etc.

The conventional model expresses the qualification of an advantage as undue without requiring a limit that acts to hinder the verification of the fact from an evidentiary point of view. This regulatory context is undoubtedly absent in proving an agreement between the parties justifying the undue payment at the moment which constitutes the object of the case and the agreement is not contemplated in the description of the standard fact.

A second element contributes to the selection of criminal behaviors that are uniquely relevant in the OECD and the UN Conventions in contrast to European ones that require conduct to be committed with the aim of: “(...) obtaining or retaining

business or other advantages in international commercial operations (...)"'. This position excludes the model case of exogenous corruption which respects the global commercial and economic context. The rule does not include the active conduct that is finalized in the international contract, resulting in the case that pursues a mere advantage which is linked as an improper one in the case of the OECD Convention and as undue in the UN Convention. What is important is the deal and the advantage for the corrupter who is part of a commercial operation of international importance at the moment and/or in the future. In the UN Convention it appears to be broad. According to the OECD Convention, a deal or an advantage that concerns a commercial operation is followed, as can be seen in the Merida Convention, which is sufficient for a connection, which we can say is weak, to integrate the standard case, expanding its application in the case of a broad category of behaviour. As regards the UN Convention, a more restricted line remains regarding the selection of an advantage for the corrupter which is likely to have criminal relevance as recorded in the confines of the case which concerns the context in which the fact must take place.

A common element is underlined in both texts which include sanctions only for corruption as a considerable entity, leaving out

small corruptions which in practice do not alter the correct conduct of competition between companies in international trade. The UN Convention leaves out, *rectius* free, the countries which have joined and which have criminal relevance such as small payments which facilitate the execution of an act which complies with official duties but does not affect economic transactions of international importance. Within this context the OECD Convention consider small payments excluded from relevant payments⁶⁹.

The commercial matrix and the *dolus specialis* constitute the distinctive element in the case of international corruption in the original perspective which implements the OECD Convention conceiving international competition. The perspective of the Criminal Convention and the EU Convention is different. Both texts cited are connected with international trade which requires the configurability of the crime. Thus two divergent models arise. The first of economic origin of the case and a second which is

⁶⁹Art. 30, par. 9 of the UN Convention which is affirmed that: “(...) nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a state party and that such offences shall be prosecuted and punished in accordance with that law (...)”. See also: par. 9 of the Explanatory Report, *op. cit.*

structured by the public interests of the administration. The lack of a special model of intent makes the incriminating case wider in the case of the Criminal Convention and the EU Convention. The choice of the European Convention, the anti-corruption provisions change in compliance with the original perspective as rules where the good performance of public administration and the correct management of public functions as a principle of solidarity between states in the international context as a position not different from the protection in economic and market interests which constitute the basis on which the American model, was built according to the OECD Convention.

The systematic framework of the case appears as a mere extension of internal corruption to transnational facts. This perspective is not convincing and does not ensure the greatest level of effectiveness of discipline and action on international corruption and at the same time risks focusing on a broader category of behavior where the risk loses the objective of sanctioning “models” of a major type of corruption.

A doubt remains regarding the repression of facts that are corruptive, suitable for sanctioning a greater number of illicit behaviors and which spread a climate of tolerance towards a corruptive phenomenon. This does not seem to be a task of international corruption not only due to the historical and

political bases but also to the basis of the criminalization process, above all because there are no changes that make the initial perspective current.

The increase in international corruption is not only a moment of crisis and failure of a national policy or of the increase in international commercial transactions but rather connected to the need to fight corruption which is “impressive” in large international contracts and for the sophistication of the means, the availability of resources that allows multinational enterprises to distance themselves from the sanction of domestic laws.

The case of corruption that is connected to international trade risks distorting the system which is not essential for the original discipline but produces a general weakening of the same given that the system is not focused on the forms of manifestation of the phenomenon detrimental to the legal good but a task of safeguarding different legal assets and a wide sphere of behavior having a different degree of offensiveness.

This perspective is not perfectly consistent with the original model but with the one that animates the desire to strengthen anti-corruption policies and which risks losing important pieces in a context characterized by limited resources that are insufficient. This model is oriented towards the prosecution of international corrupters towards the repression of international

corruption. Specific fraud in the commercial sector selects illicit payments that have to do with low-level transnational and international conduct such as corruption committed by a private individual to the detriment of a small administration of a foreign state between the country of origin and that of the legal assets of reference which prepares provisions on national corruption.

This model is oriented towards the repression of national corruption which is committed by international corrupters who deal with international corruption in the strict sense. This perspective is the same one that risks deviating the application practice in the American discipline with the difference that it maintains the objective of sanctioning big corruption in itself as a notion of corruption at a global level (Kang, 2023).

The subjective element of conventional cases allows the existence of two different models. One on international corruption in the proper sense which is connected with the conduct of business of global importance and a second all-encompassing, less focused on the American perspective. The conventions relating to the two models are present in the peculiarities of a personalized nature and in general terms towards a recognizable model which is common in the OECD Convention, the UN Convention, the unitary identity of the Criminal Convention and the EU Convention.

The description of specific fraud involves a different scope of application which is extended in the European model and less extensive in the case of the multilateral model. The effects between the two models are susceptible not only in terms of transposition into the incriminating cases but in the vision oriented towards the fight against corruption which exposes the European model to an excessive punitive capacity.

The subjective element is undoubtedly a point of divergence between the various models proposed which does not constitute the only point of criticism between the conventions under investigation which diverge in relation to the notion of public official with effects also from a practical point of view and in the application of the dispositions that are inspired.

The notion of foreign public official

We cannot speak of international corruption when the elements of transnationality have to do with the methods and place of the commission of the standard act and when the corrupter and the corrupted belong to the same system of origin. The case of corruption contains a foreign audience. The notion of foreign official assumes an active function in the selection of conduct behaviors that are criminally relevant.

The OECD Convention has set out the broad criteria for the description of the notion of foreign public official using canons of an alternative nature and of a formal nature, paying attention to the office where the substantial character highlights the function performed by the public agent. In particular, Art. 1 states that: “(...) foreign public official (...) means any person who holds a legislative, administrative or judicial office, whether by appointment or election as well as any person who exercises a public function for a foreign country, a public body or a public enterprise including, inter alia, any officer or agent of an international public organization (...)”⁷⁰.

The OECD Convention has provided for the public agent: “(...) the criteria set out by it, to prevent the internal discipline of the adhering countries, especially those more tolerant with respect to transnational corrupt practices, from guaranteeing margins of impunity, making the provisions introduced in compliance with the covenant commitments (...)”.

⁷⁰See Art. 1, par. 4, lett. a) of the OECD Convention which affirms that: “(...) for the purpose of this Convention: a) “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization (...)”.

The perspective of the Criminal Convention does not follow the same spirit of definition. The public official is “(...) is understood by the contracting parties according to the definition given by domestic law, i.e. the law of the state in which the official exercises his functions, thus providing for the application of the *lex loci* (...). It establishes that the conduct can be prosecuted abroad only where the official's *lex loci* is compatible with the notion of public agent in force in the prosecuting state, thus adding a further limit to the application of the sanction (...)”⁷¹.

It is clear that the two international conventions are based on models that are divergent in the fight against international corruption and on the perspective of the Criminal Convention which is less broad than the OECD Convention. The Criminal Convention does not exempt from the criminalization of conduct as well as cannot fall within the scope of application of the broader case due to the restrictive notion of public official that it provides. The Criminal Convention includes corruption between private individuals among its prosecution obligations, therefore the public function falls within the ancillary category⁷².

The case of corruption between private individuals as foreseen by the Council of Europe is oriented towards the expression used of

⁷¹Art. 1, par. 1, lett. c) of the Criminal Convention.

⁷²Art. 7 of the Criminal Convention.

the violation of official duties while public corruption concerns the exercise of the function. The scope of application of the private case is limited and respects the standard case of international corruption as envisaged by the OECD Convention and which appears to be the preferable model for an effective and less difficult application of the criminal law⁷³.

The EU Convention was based and oriented towards the model of the Criminal Convention. In particular, Art. 1 of the text of the agreement states that “particular relevance to the *lex loci* of the official” is given whether it is a “community” or a “national” official. Both notions form a formal criterion based on the derivation of the contract from the “Statute of officials of the European Communities”. This is a substantial criterion, based on the functions actually exercised by the public agent, where the same correspond to those of officials or other agents of the European Communities. Both the criteria do not converge towards an autonomous model of definition of the public agent, since both converge towards the *lex loci*, which, in this case, is the European one. According to the Convention, a person is considered a national official, based on what established by the legal system in which he exercises his functions. In this case the

⁷³Artt. 2, 5 and 7 of the Criminal Convention and Art. 1, par. 4, lett. a) of the OECD Convention.

legal system to which he belongs is relevant, instead the notions or the defining criteria dictated by the EU Convention, are absent⁷⁴.

The EU Convention has established the criminal proceedings initiated by another Member State where the notion of public official of the foreign state is applied and is compatible with the internal definition, thus placing a similar limit on the application of the criminal sanction for corrupt conduct of an international nature⁷⁵.

The UN Convention is oriented towards the model of the OECD Convention. Art. 1 of the text states that: “(...) the notion of foreign public official includes any person who holds a legislative, executive, administrative or judicial office in a foreign country if appointed or elected, as well as any person who exercises a public function for a foreign country, including public bodies and public companies, as can be seen from the following table (...)”⁷⁶.

These are two models in comparison where the first is inspired by the logic of autonomy and the second based on the application

⁷⁴Art. 1, par. 1, lett. (a), lett. (b) and lett. (c) of the EU Convention.

⁷⁵Art. 1, par. 2, of the EU Convention and Art. 1, par. 1, lett. c) of the Criminal Convention.

⁷⁶Art. 1, par. 1, lett. (b), of the UN Convention. Art. 1, par. 4, lett. a) of the OECD Convention.

of the *lex loci* in determining the boundaries of the notion of foreign public official. The two extra-European Conventions are oriented towards a single, more stringent and efficient model in the fight against international corruption, unlike the UN Convention where the repression of the various forms of corruption extends to the criminalization of ancillary conduct such as for example the corruption between private individuals⁷⁷. The UN Convention shows a more efficient protection with regards to the legal asset that is protected by the case given that it provides for incriminating cases of an auxiliary nature to the main crime by extending the scope of application and providing for an autonomous notion of foreign public agent without requiring that the same is governed by national legislation concerning national legislation adequate to the convention. The UN Convention affirms a more stringent model, effective in combating the fight against international corruption which is inspired by the OECD Convention and which includes elements of interest which contain the European Conventions and above all the Criminal Convention which borrows the criminalization of other criminal cases ancillary respectively to the crime of international corruption as we will see later.⁷⁸

⁷⁷Art. 21 of the UN Convention.

⁷⁸See par. 206 della Legislative Guide for the implementation of the United Nations Convention against corruption.

Ancillary incriminating cases and their codification

As we have understood from the previous paragraphs, the codification of ancillary incriminating cases results in a direction that prevents and/or allows the impunity of the agent.

Many provisions in the anti-corruption sector are understandable in terms of criminal policy and in the action to combat this criminal phenomenon. However, verifying the fragmentation of the cases contributes to strengthening the fight against international corruption and ends up weakening it. This is how different recording models appear. The American law model focuses on cracking down on international corruption. The OECD Convention is the cornerstone that inspires and replicates its content, limiting the case of international corruption as specified with the sanction of laundering of proceeds to a provision on the correct keeping of accounting books, i.e. of figures that constitute a moment prior to the case type⁷⁹.

In this case we are not talking about actual ancillary figures but about cases that differ in a specific way or by consumption from the criminal ones that contribute to the same legal goods as the model cases. These are incriminating rules that contribute to the legal qualification of criminal acts which are alternatives to cases

⁷⁹Artt. 7 and 8 of the OECD Convention.

of international corruption.

Both in the UN Convention and in the Criminal Convention, the cases of international corruption collaborate and are connected as criminal figures of various types which concern national corruption, corruption between private individuals and the trafficking of illicit influence such as for example abuse of office and illicit enrichment⁸⁰.

The Criminal Convention and the UN Convention certainly constitute international corruption as a leading and central figure and at the same time criminalization is considered as a consequence of domestic corruption. It is ancillary to the main case and is related to national corruption.

This element is evident in the Criminal Convention as a case of international corruption and in reference to the provision on national corruption⁸¹. In the UN Convention the case has a specific content that goes beyond the criminal figure relating to national corruption as an element of specific economic and commercial intent. This is an auxiliary, competing case that joins the others in the repression of the phenomenon of forms of demonstration⁸². The position of the case in the conventional

⁸⁰Artt. 2, 3, 4, 7, 8 and 12 of the Criminal Convention and Artt. 15, 18, 19, 20 and 21 of the UN Convention.

⁸¹Art. 5 of the Criminal Convention.

⁸²Art. 16 of the UN Convention.

context has little relevance in specific terms and the incrimination obligations are fulfilled by the adhering countries and where the case is adequate and structured according to the presence or not of ancillary cases which do not affect the strengthening and weakening of criminal protection. An element that is not devoid of significance from a national perspective and in the repression of domestic corruption as well as of conventional models. The OECD Convention already attributes corruption of foreign public officials on an international level, leaving corruption without this element of transnationality. The model converges with the Criminal Convention and the UN Convention starting from the assumption that domestic corruption is an international affair. But it is so?

Our investigation does not focus on the differences between domestic corruption that becomes international and international corruption that can start and/or become domestic. However, the dimensions of the phenomenon of corruption in absolute terms are consolidated by this axiom. This must be underlined in the centrality of national corruption, i.e. in the conventional model which is limited to the application of ancillary cases having a transnational character. Only the Criminal Convention concerns illicit influences as the only type of trafficking and its prosecution which continues at an international level. Article 12

of the Convention states that: “(...) prosecutes anyone who promises, bestows or offers, directly or indirectly, an undue advantage to anyone who claims or confirms to have the ability to exercise an improper influence on the decision-making process of both the national and the foreign public official, a member of a foreign or international parliamentary assembly, an officer of an international organization, a judge or an officer of an international court (...)”⁸³. The Criminal Convention does not take a position in the sector of corruption between private individuals of a transnational nature. Article 7 states that: “(...) sanctions the violation of the duties of the person who operates on behalf of a “private entity” without specifying that foreign companies are to be included (...)”. The failure to mention elements of transnationality, which are instead expressly included in the case of trafficking in illicit influence, leads to the exclusion of the possibility that the criminal act of corruption between private individuals can sanction transnational private corruption. It takes on even more significant relevance in a model which, as we have seen, enhances the *lex loci* in the notion of foreign public official, thus considerably narrowing the field of application of the typical case. We can say the same for the UN

⁸³Art. 12 of the Criminal Convention as well as articles 5, 6, 9, 10 and 11 of the same Convention.

Convention where the absent elements in favor of an extension of the types of crimes and facts of a transnational nature are not criminal figures of corruption between private individuals and in a completely similar way to the Criminal Convention as a case of trafficking in illicit influence⁸⁴. The exclusion of influence trafficking takes on a significant importance considering that the main differences from the American model exclude the model case in the prosecutability of giving to the third party and in the belief that part of the money is intended for the public agent. Both forms influence the foreign official and are devoid of criminal sanctions. The fragmentation of the cases is not accompanied by their applicability, as compatible with facts of a transnational nature which risks the crime of international corruption on the margins of the fight against corruption and as being characterized with greater relevance by the elements of transnationality. The only convention that is oriented towards a more sufficient model is the criminal one. The lack of alternative cases are competing with the same legal goods which are considered as neutral data, capable of posing and creating gaps in the criminalization process.

The ancillary cases are of no relevance for the fight against international corruption as we understand from the UN

⁸⁴Artt. 18 and 21 of the UN Convention.

Convention since they do not contribute to the enforcement action. The fragmentation of the cases is an element that weakens the efficiency of the conventional model and highlights the severity of an action to combat international corruption which also respects national corruption. Thus the conventional choices operate in the UN Convention which appears appropriate and quite problematic.

Legal entities and their responsibility

The macroscopic nature of international corruption has reached absolute levels and shocking attitudes in recent years. On the one hand, the influence of the emergence of the now obscure figures is not linked to the growth of economic exchanges between countries where the globalization of commercial enterprises has multinational forms. The fight against big corruption is also linked to legal entities since the Watergate scandal has led to the cause of the multinational company's foreign activity following corrupt conduct.

The conventions that we have analyzed in the previous paragraphs with all their peculiarities show perspectives that bind the contracting countries and the responsibility of companies for corrupt conduct. The OECD Convention, based on US law,

formally committed the adhering countries to take necessary measures in accordance with domestic law by providing for the liability of entities for the corruption of foreign public officials⁸⁵. Art. 2 of the OECD Convention does not establish exactly the type of responsibility to be attributed to the entity, whether criminal, civil or administrative, thus leaving the freedom of action of the contracting parties to be based on the principle of equivalence, calling for the introduction of measures that have the following character: “effective, proportional and dissuasive”⁸⁶.

The treaty text, unlike the American one, does not illustrate the characteristics of a model of responsibility that is also introduced into national systems. It is not established whether the liability structure conceives the OECD Convention that must achieve: “(...) a) the US model of vicarious liability (also called *respondeat superior*), starting from civil law, which does not allow the legal person to be exempted from responsibility, even if it has implemented an adequate level of prevention, but if anything to receive a reduction in sanctions for this reason (Parker, 1996; Coffee, 1999; Dimento, Geis, 2005; Nanda, 2011); b) that is, the English model of identification theory, also called

⁸⁵Art. 2 of the OECD Convention.

⁸⁶Art. 3, par. 1 and par. 2 of the OECD Convention.

alter ego, whereby since there is identification between the natural person who commits the crime (considered the arm) and the society that benefits from it (considered the mind), the conduct is automatically attributed to the entity (model, recently, mitigated by the possibility of exculpation for the entity that has prepared adequate levels of anti-corruption prevention) (Wells, 2001; Stark, 2011; Pieth, Ivory, 2011)⁸⁷; c) the most recent model of organizational negligence (deficiency of the company), which allows the attribution of responsibility to the entity that expressly, tacitly or implicitly authorized or permitted criminal conduct, extending responsibility also to cases of negligence, and thus stimulating a modern culture of compliance and respect for criminal laws (...)” (Mays, 1998; Beale, 2009; Nanda, 2010; Batzilis, 2015).

On the contrary to what has been said above, the OECD Convention formulates the use of the treaty text as neutral with all the approaches that are possible and which are acceptable given that they achieve the objective of effectively sanctioning corrupt conduct (Pieth, 2014).

The Criminal Convention seeks to specifically regulate the liability of the entity among the countries that are members and required to comply. Thus we note Art. 18 of the text of the

⁸⁷See the case: *Tesco Supermarket, Ltd v. Nattrass*, 1972 A.C. 153.

agreement which states that: “(...) measures are adopted in national systems that provide for the liability of the legal person for conduct of “active corruption” - also meaning active international corruption (...) committed in the interest of the body, by individuals in top positions who have the powers of representation, decision or control. Secondly, the same article also provides that the responsibility for the fact of corruption can be attributed to the entity even in the case in which a lack of supervision or control towards the subordinate subjects, by the aforementioned subjects in top positions, has permitted the perpetration of the conduct, to the benefit of the entity (...)”⁸⁸.

The choice of the Criminal Convention is quite distant from a form of responsibility that arises autonomously and through organizational fault, thus focusing on the attribution of the entity for an act committed and by subjects in a position where adequate supervision is lacking. The reference model of the Convention thus appears not ready and/or suitable for the identification of the top management person in collaboration with the entity. The Convention itself, as well as in the case of the OECD Convention, does not attempt to regulate the type of liability that allows sanctions which are of a criminal or non-criminal nature and which are included as pecuniary sanctions

⁸⁸Art. 18, par. 1 and par. 2 of the Criminal Convention.

and/or as effective, proportionate and dissuasive sanctions⁸⁹. The legislation of the Union, the EU Convention does not regulate the liability of the entity. It establishes as an obligation the contracting parties that provide for the internal provisions, i.e. the subjects who are in an apical hierarchy of a legal person and who can be held accountable for the fact that is committed by their persons who are subordinate and according to the interest of the institution⁹⁰.

The responsibility of the entity is found in the second additional protocol of the convention on the protection of the financial interests of the EU. Art. 3 of the Protocol obliges each member country to provide for the responsibility of the entity for active corruption committed for the benefit of the same, as a person who holds a top position in the legal person having powers of representation and of a decision-making and/or control nature at the time of surveillance and control of subjects who allowed the perpetration of the illicit conduct of a subordinate employee⁹¹.

⁸⁹Art. 19, par. 2 of the Criminal Convention.

⁹⁰Art. 6 of the EU Convention.

⁹¹Art. 3 of the second Additional Protocol to the Convention on the protection of the financial interests of the European Communities. Art. 1, par. 1, letter. d) of the same Protocol affirms that: “(...) legal person is any entity that is such by virtue of national law, excluding states, public institutions in the exercise of public powers and international organisations.

The protocol, as well the OECD Convention and, the Criminal Convention do not establish a type of responsibility whether it must be criminal liability or any other type, thus limiting itself to affirming the need to continue pecuniary sanctions of an effective, proportionate and dissuasive nature⁹².

The Protocol, unlike other models, specifies that states can provide for sanctions such as the exclusion of the enjoyment of advantages, public aid, temporary or permanent bans on carrying out a commercial activity as well as the subjection of judicial supervision and judicial dissolution of the entity. It is underlined that the protocol measures in a susceptible manner and with particular effectiveness, dissuasive species which are foreseen jointly by the financial penalty⁹³. The application of these

The discipline contained in the aforementioned art. 3 mirrors that dictated by Art. 5 of Framework Decision 2003/568/JHA on the fight against corruption in the private sector, op. cit., which also establishes an obligation for member countries to provide for the liability of legal persons for acts of corruption between private individuals.

⁹²Art. 4 of the second Additional Protocol to the Convention relating to the protection of the financial interests of the European Communities, which provides that sanctions may be of both a “criminal” and “administrative” nature.

⁹³Art. 4, par. 1, letter. from a) to d) of the second Additional Protocol to the Convention on the protection of the financial interests of the European Communities.

provisions appears to be in itself limited to the protection of the financial interests of the Union and where the provisions of the convention relating to the protection of the financial interests of the Union of the first and second Protocols are addressed. The responsibility of the entity appears to be confined to national and/or intra-community, transnational corruption which is likely to harm the interests of the Union, excluding not only internal international corruption of the Union which is devoid of this requirement and is harmful to the economic and market interests but as corruption of the non-European official tout court⁹⁴.

⁹⁴Article 3 of the Convention on the protection of the financial interests of the European Communities, which obliges Member States to provide for criminal liability for company managers, i.e. the subjects who exercise decision-making and control powers within a company, for acts of fraud committed by a person subject to their authority, to the detriment of the “financial interests” of the Union; Art. 3 of the first Additional Protocol to the Convention on the protection of the financial interests of the European Communities, which obliges states to provide for criminal liability for corruption of a “national” or “community” official who harms or may harm the “financial interests” of the Union; Art. 1, par. 1, letter. c) of the second Additional Protocol to the Convention relating to the protection of the financial interests of the European Communities, which refers to Art. 3 of the first Protocol for the notion of active corruption relevant for the construction of the entity's liability, pursuant to Art. 3 of the second Protocol.

This second aspect has been included in the PIF Directives which provides for the obligation for Member States to provide for the incriminating cases for the corruption of public officials, including non-European ones, where the financial interests of the Union are damaged. They provide that such facts can be declared responsible the legal person for the benefit of which the conduct was carried out, i.e. on the model already set out⁹⁵. These provisions connected with corruption detrimental to the financial interests of the Union as not a real model of liability for international corruption conduct which are committed to the advantage of the legal person when they assume the relevant relevance where an actual or potential damage of the financial interest is protected. The structure of liability appears similar to that identified in the criminal agreement where the entity is accused of active behavior by the individual who holds top positions and/or the lack of control over the subordinates.

The UN Convention is different and close in terms of discipline to the OECD Convention. In particular, Art. 26 of the UN Convention commits: “(...) states to establish the responsibility of legal persons for participation in the criminal conduct established pursuant to the text of the agreement, and with them also

⁹⁵Art. 4, par. 2, lett. a) and lett. b) of the Directive (EU) 2017/1371, op. cit., and Art. 26, par. 1 of the UN Convention.

international corruption, without however analytically regulating the structure of responsibility, i.e. whether it should be the attribution of an act committed by individuals in top positions, by individuals who act as the company's hand, or through organizational negligence (...)”.

The text does not provide a typology of the responsibility of the entity that the states are called upon to introduce, establishing that the same can have a civil, criminal and administrative nature at the discretion of the contracting countries and according to the principles of domestic law⁹⁶.

The non-typification of the structure of the type of responsibility responds to provisions of a broad nature that are implemented by the contracting parties without conflict and with their respective systems, taking into account the number of diversities of legal systems and the provisions that must comply (Borlini, 2019). This position does not count as regards the OECD Convention and in relation to the liability of the legal person which prejudice the criminal liability of the perpetrators of corruption and which ensure the application of effective, proportionate and dissuasive sanctions⁹⁷. In this framework, two different models of corporate responsibility can be seen. The first which identifies the OECD

⁹⁶Art. 26, par. 2 of the UN Convention.

⁹⁷Art. 26, par. 3 and par. 4 of the UN Convention.

Convention and the UN Convention where effective sanctions are provided for states without offering a structural model for compliance. In a second line it is identified with the Criminal Convention which in the second additional protocol to the convention enhance the financial interests of the EU, as well as the PIF Directive squares the responsibility of the legal person as attribution to an entity of the conduct committed or omitted by subjects who are in apical position.

These are effective choices that deal with a conventional model that also finds its basis in different legal systems despite what we understand from the OECD and the UN Conventions. The formula used in the two conventions allows states to be guaranteed a good margin of action to introduce disciplines that are internal and in compliance with international obligations and without including the internal principles of the legal system. The Criminal Convention was oriented towards a defined model which was based on the attribution of the entity and on the responsibility for facts that are committed by a top management of the company, limiting in such a way the characteristics of the liability of the legal person to a management that adopts adequate organizational systems, control and management.

Conventional models and the emerging legal framework

The characteristics and causes of the defect in a reconstruction of the legal framework regarding national provisions are investigated to understand the process and integration of the process of criminalization of international corruption.

We can talk about two models. The first is part of the UN Convention and the second is part of the Criminal Convention. The aspects that are noted have to do with: “(...) the prosecutability of active international corruption; -the construction of a free-form conduct concerning promise and bestowal; the inclusion of the behavior of the public agent in the subjective element, rather than among the constituent elements; -the irrelevance, for the purposes of the configurability of the case, of the acceptance of the public agent or of the agreement with the latter, with regard to corruption; -the introduction of criminal, civil or administrative liability of the entity for facts of international corruption (...)”⁹⁸.

These are elements of a model that are at odds with international corruption. The central character of the exclusion of behaviors that are external to the public agent and towards the corrupter is highlighted, such as for example acceptance, the administration to which they belong, the adoption of an act and, the

⁹⁸Art. 26, par. 3 and par. 4 of the UN Convention.

prosecutability of active conduct. The exclusion from the agreement of the constituent elements highlight the active behavior of the agent expresses its offensiveness which is configured as an offense of a crime in danger.

The models with regard to the elements of the identification of a legal framework regarding international corruption have the following characteristics: “(...) the prosecutability of passive international corruption; -the extension of protection beyond the limits of the function, to include official duties in general; -the relevance of corruption without commercial origin; -the autonomy of the notion of public agent; -the centrality of the case of international corruption, within the context of the counteraction prepared by the model; -the structure of the liability of the legal person, if of an objective nature, or for “organizational fault” (...)” (Kang, 2023).

The OECD Convention is aimed at repression of international corruption which focuses on the attention it gives to economic and commercial corruption and which is aimed at the adoption of a behavior that is connected with the conduct of business, i.e. in this case an element central in the model. Other conventions are also based on this model in other aspects such as the single-subjective nature of the case and the qualification of the advantage that has to do with and is aimed at the public agent.

These are aspects that guarantee effectiveness in the identification and repression of offensive behaviour. The single-subjective structure in this case contributes to aspects that are related to the figure of the public agent and which is limited in the application of the sanction to the corrupter, whereas the qualification of the public agent can limit the application of the sanction to the corrupter as an undue qualification that contributes to select one's own suitable behaviors, as a legal asset that protects the specific behavior of behaviors that are not formally prohibited to the public agent and the international economic operator.

PART 2: Structure and Analysis of the Foreign Corrupt Practices Act (FCPA)⁹⁹

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The global application of the FCPA

The adoption of the FCPA was presented as an instrumental model of a strong nature capable of repressing the conduct of corruption of foreign public officials which has to do with the pervasiveness and diffusion in the context of multinational enterprises, thus involving the choice to criminalize international corruption.

The bribery schemes that are presented in the American panorama after the Watergate scandal are connected with the improper payments of foreign officials and the falsification of accounting records with the creation of slush funds as foreseen for corrupt practices. Economic provisions fuel official corruption as an issue that simultaneously addresses anti-bribery provisions (Noonan, 1989).

Within this context the considerations in the structure of the FCPA and the accounting and financial statement provisions of

⁹⁹The second part is written by Kim Hong, Ph.D, Attorney at Law, US.

companies as well as the anti-bribery provisions and the books and records and internal controls provisions as noted by the SEC and as they expressly demonstrated the need to intervene in the second aspect, are prohibited (Wade, 1982; Timmeny, 1982; Longobardi, 1987; Penalver, 2010)¹⁰⁰.

In the following paragraphs we will see who provides procedural provisions, i.e. from the negotiation of agreements to the investigating authority which manages to avoid the establishment of a related trial. The premises are indispensable in relation to the overall effectiveness of the American system and constituted by the provisions that are substantial in the FCPA (Krishnakumar, 2023).

Anti-bribery provisions. Anti-corruption protection

The prohibition on direct or indirect correspondence and the promises of bribes or benefits in general for foreign officials is a protection step proposed by the FCPA (Greanias, Windsor, 1982; Zarin, 1995; Best, 1996; Bialos, Husisian, 1997; Levenson, 1997; Cassin, 2008; Murphy, 2010; Biegelman, Biegelman, 2010; Friedman, Rodriguez, Smithline, 2012; DOJ, SEC, 2012; Kohler,

¹⁰⁰SEC, Report on Questionable and Illegal Corporate Payments and Practices, op. cit., p. 1 ss.

2012; Murphy, Kutcher, 2013; Deming, 2014a; Tarun, Tomczak, 2018; DOJ, SEC, 2020).

The regulatory requirements differ and are divided into three categories of subjects acting in the legislative text. The anti-bribery provisions are uniform and have the following features: - Prohibitions¹⁰¹; - Exceptions for routine governmental action¹⁰²; - Affirmative defenses¹⁰³; - Injunctive relief¹⁰⁴; - the Guidelines by Attorney General¹⁰⁵; - the Opinions of Attorney General¹⁰⁶; - the

¹⁰¹15 U.S.C. §§ 78dd-1(a) for the “issuers”; 78dd-2(a) for the “domestic concerns” 78dd-3(a) for the “others”.

¹⁰²15 U.S.C. §§ 78dd-1(b) for the “issuers”; 78dd-2(b) for the “domestic concerns”; 78dd-3(b) for the “others”.

¹⁰³15 U.S.C. §§ 78dd-1(c) for the “issuers”; 78dd-2(c) for the “domestic concerns” 78dd-3(c) for the “others”.

¹⁰⁴15 U.S.C. §§ 78dd-2(d) for the “domestic concerns” 78dd-3(d) for the “others”.

¹⁰⁵15 U.S.C. §§ 78dd-1(d) for the “issuers”; 78dd-2(e) for the “domestic concerns”. Such features are absent in the regulations dictated in relation to “others”.

¹⁰⁶15 U.S.C. §§ 78dd-1(e) for the “issuers”; 78dd-2(f) for the “domestic concerns”; Such features are absent in the regulations dictated in relation to “others”.

Penalties¹⁰⁷; -the Definitions¹⁰⁸; -the alternative jurisdiction¹⁰⁹. These are provisions that are part of the FCPA and have an overlapping nature. In relation to the prohibition sector, the cases are incriminating. The provisions concerning injunctions, guidelines and opinions as well as penalties and the alternative jurisdiction concern the work of the prosecutor¹¹⁰.

Prohibitions

The agents are identified in anti-bribery provisions, i.e. one of the three categories subject to American regulations regarding the fight against international corruption which are part of a legislative technique which include the issuers, the domestic concerns and the others who they opt towards the construction of different anti-bribery provisions, the structure and content and as

¹⁰⁷15 U.S.C. §§ 78dd-2(g) for the “domestic concerns”; 78dd-3(e) for the “others”. Such features are absent in the regulations dictated in relation to “others”.

¹⁰⁸15 U.S.C. §§ 78dd-1(f) for the “issuers”; 78dd-2(h) for the “domestic concerns”; 78dd- 3(f) for the “others”.

¹⁰⁹15 U.S.C. §§ 78dd-1(g) for the “issuers”; 78dd-2(i) for the “domestic concerns”. Such features are absent in the regulations dictated in relation to “others”.

¹¹⁰15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3.

an exception the specificity that will have the opportunity to linger as common. The regulatory provisions are divided into three different subcategories of the FCPA where the text is identical (Weiss, 2020).

In theory the structure is certainly unique but also simple. At the beginning we note the identification of the subjects-agents who disseminate the description of the material element of the crime and the subjective one. The content of the three provisions is superimposable in exception of the peculiar aspects that are presented as a reserved rule which is part of the others and which concern the territorial connection of the form of conduct.

It is noted that the initial part is different in each of the three provisions and identifies the agents to whom the single prescription was addressed according to the rules of the FCPA¹¹¹. The core of the incriminating case is common and contains the prohibition on giving and offering to foreign public officials who are foreign political exponents and to those who take on the roles of political candidates and of intermediaries¹¹². Such conduct is prosecutable and finalizes, obtains and, maintains any economic advantage.

¹¹¹15 U.S.C. §§ 78dd-1(a) for the “issuers” 78dd-2(a) for the “domestic concerns” 78dd- 3(a) for the “others”.

¹¹²15 U.S.C. §§ 78dd-1(a)(1)(2)(2) for the “issuers” 78dd-2(a) (1)(2)(2) for the “domestic concerns” 78dd-3(a) (1)(2)(2) for the “others”.

As regards the issuers and the domestic concerns, the method of commission of the crime is foreseen and it is not expected that it will be committed within the territorial borders of the US. Instead, in the case of the others the incriminating case presents itself with different characteristics¹¹³.

Before concentrating on the analysis of the content of the provisions and the differences that are noted, i.e. the need for the others and the conduct that occurs within the territorial borders of the US to be punishable, we focus on the extensive catalog of methods and corrupt conduct which is committed. Such a catalog prefers to identify the analysis of subjects who comply with the FCPA and in the subjective sphere its application where the subjects establish how it regulates individuals in detail and the objective scope of application complies with the legislative text¹¹⁴.

The agents

The anti-bribery provisions formulate the offer and promise to correspond, authorize the payment of sums of money, the delivery of gifts or other benefits, to foreign public officials in an

¹¹³15 U.S.C. §§ 78dd-3(a).

¹¹⁴15 U.S.C. §§ 78dd-1, et seq.

indirect manner with the aim of influencing official decisions and convincing, carry out the violation of official duties.

This is a specific prohibition based on three categories of entities that are part of the FCPA, i.e. joint-stock companies, including foreign ones, that have securities traded on the American market (the issuers); legal entities under American law and natural persons who have American nationality (domestic concerns); legal and natural persons of any nationality with different previous categories who commit corruption practices and who have a territorial connection with the US (others). The boundaries of the categories of subjects that are subject to the FCPA give attention on the provisions that define the subjective scope of application for the three categories that are referred to and that are in the text in force.

Issuers

According to Article 78dd-1 of the FCPA, issuers are companies issuing securities registered in the US or subject to the control of the SEC¹¹⁵. Issuers according to the FCPA are any company where under American or foreign law includes a category of securities traded on the American market and registered with the

¹¹⁵15 U.S.C. § 78dd-1.

SEC according to Section 12 of the Securities Exchange Act¹¹⁶. In such a case it is required to file reports that are analytical in the company's financial situation with the SEC itself and according to Section 15 (d) of the Securities Exchange Act¹¹⁷. This is any company that has securities traded on a stock exchange list of the US and/or on an unregulated market (over the counter) from the US, where it is required to send reports on the economic and financial situation of the issuer that is consider as such. It does not matter that the company is under American law if it accesses the issuing and trading of the American securities market and according to the established procedure. The prohibition on corrupt conduct concerns those who act on behalf of the company, i.e. the managers, directors, employees and agents of the same as well as shareholders. The responsibility of the company also depends on the conduct of subjects who are internal and who do not hold positions in top positions, i.e. external subjects, such as external agents and without operational roles such as for example shareholders who do not participate in the administration of the entity. Subjects who are subject to the provisions against corruption of foreign public officials and who are also personally liable in the event of a violation and who

¹¹⁶15 U.S.C. § 78l.

¹¹⁷15 U.S.C. § 78o(d).

cause the entity to be liable¹¹⁸. This category is of greater interest in light of the case studies of the period of application of the FCPA. Sanctions that are imposed and which concern companies qualified as issuers even if the conduct of international corruption is contested and which connect the American territory. The application criterion of the FCPA was based on the quality of the company which is the issuer of securities traded on the American market and which saw the principle of the territoriality of criminal law drop to a step that respects the needs underlying the application of the American discipline on the subject of corporate corruption (Tully, 2005).

Domestic concerns

Subjects of American nationality are considered as domestic concerns according to Art. 78dd-2 of the FCPA. This applies to natural persons who are considered to be domestic concerns and legal persons who do not fall within the scope of this category and who are prior to the issuers¹¹⁹.

Paragraph (h)-1 of the same article specified that: “(...) any natural person who has a nationality, citizenship or residence in

¹¹⁸15 U.S.C. § 78dd-1(a).

¹¹⁹15 U.S.C. §§ 78dd-2.

the United States; - any legal person (enterprise, including individual, or multinational, in partnership, established in the form of a joint stock company, association or organization, even unrecognized, business trust) that is established according to the law of a U.S., or of a territory, possession, or Commonwealth of the United States, or which has its principal place of business in the United States (...)”¹²⁰. Paragraph (a) extended the liability of directors, managers, employees and agents of domestic concerns as well as shareholders according to the formula similar to that seen for the issuers even if they are non-American persons or companies.

Other persons

As other persons according to Art. 78dd-3 of the FCPA are subjects who are different from issuers and domestic concerns. The category of territorial jurisdiction, unlike the previous ones, includes a territorial criterion that applies the anti-bribery ban and is not based on a subjective selection criterion of agents¹²¹.

This is a reference that includes every legal and natural person that falls within the notion of issuers and domestic concerns, the

¹²⁰15 U.S.C. §§ 78dd-2(h)-(1) (A) and (B).

¹²¹15 U.S.C. §§ 78dd-3.

director, manager, employee and the shareholder or agent acting as persons who carry out the conduct of the law that is located in the territory of the US¹²².

This is a legislative approach to criminal policy that is different from previous provisions. The first two are identified as criminal conduct that is relevant to the subjects where the statute of limitations is applicable. Instead, the third seeks to sanction behaviors that are corruptive and sanctionable in relation to the facts and events that occur in American territory. It is mentioned that this regulatory provision is not part of the original text of the FCPA which is approved by the Congress in 1977. It is introduced as a regulatory provision which is not part of the original text of the FCPA and in 1998 implemented an international obligation where the United States has assumed the signature and ratification of the OECD Convention against corruption of foreign public officials and in international economic transactions¹²³.

The export of the American model on international corruption and the adoption of numerous international conventions such as the OECD Convention observe that the process of criminalization of corruption is triggered by the approval of the

¹²²Art. 78dd-3.

¹²³Art. 4, par. 1 of the OECD Convention.

FCPA in the US, as an effect of the adaptation of national laws and to the standards for combating the corruption phenomenon that processes the basis of the inputs that come from the country that gave rise to this process. The systems affected by this type of adjustment process, including American ones, are a phenomenon that is defined as a cyclic process where the same suffers the related effects.

Conduct, passive subjects and subjective element as essential elements of the case

The FCPA prohibited the giving of improper bribes by making an offer, promise to pay, authorize the payment of sums, delivery of gifts or other benefits to foreign public officials in an indirect manner with the aim of influencing the official decisions to convince and carry out the violation of official duties with the intention of procuring for himself or others a benefit of an economic or commercial nature.

The central objective of the case is broken down into some different segments: - conduct in the strict sense, i.e. the behavior that prohibits and which consists in the prohibition of giving, promising bribes or other benefits; -the passive subjects of the crime, the subjects where the utility is aimed; -the subjective

element of the intent which embraces the conduct of the agent. The three incriminating cases are identical with the passive subjects to the subjective element. Thus, are different the conduct, the methods of committing the crime and the place of consummation.

The conduct

The case prohibits donations and bribes to foreign public officials with the aim of obtaining economic and commercial benefits. This criminalizes the improper payments we reported in previous paragraphs. The provision for both issuers and domestic concerns states that the giving or promising of money or other benefits is expressly prohibited. The prohibited behavior identifies the provision in a way that is sufficient given that the acting subject is an explicit fact of prohibition which criminally sanctions and which authorizes the offer, the promise of a sum of money, the utility and one's actual giving. The regulatory provision is sufficient in terms of typicality in relation to the prescription that identifies the behaviors that are sanctioned in the incriminating case where the giving, offering of a sum of money or other type of benefit is illegal and constitutes a criminal offense.

The bestowal

According to the regulatory provision, any doubt arises as to the actual giving of bribes or benefits given that the law sanctions improper payments. The legislative history of the FCPA focuses on the need to avoid illegitimate donations of money by American multinationals and foreign public officials and politicians through the so-called questionable payments that caused and fueled the Watergate scandal that after this period based on the legislative intervention of the Congress (Koehler, 2012; Deming, 2014b).

The promise

The improper fee by the public agent does not have to do with the commission of the crime. The case has anticipated that the punitive moment of the promise has characteristics that induce the public official to adopt the typical behavior that is foreseen by the law, believing that it falls within the scope of the behaviors that are prohibited in the constituent crime (Deming, 2014).

The offer

Unlike the provision which alternatively provides for the penalty as a promise, leads to the behavior of the public agent being in itself irrelevant for the commission of the crime of international corruption. The case focuses on a psychological attitude where the intent of the corrupter that requires the crime of corruption to achieve the objective and/or the public agent to adopt the required behavior (DOJ, SEC, 2020)¹²⁴.

In the U.S. v. Monsanto Co. case, the company had paid \$50,000 to convince an Indonesian official to revoke a law that was unfavorable to him after he received the bribe and decide not to revoke it¹²⁵. The relevant law sanctions the fact that it makes use of a means of an illicit nature of commercial activity which is capable of contaminating corruption, i.e. the correct conduct that has to do with international transactions. It is understood that giving and promising is prohibited and is in itself criminally relevant to society (Deming, 2014b).

¹²⁴It is affirmed that: “(...) by focusing on intent, the FCPA does not require that a corrupt act succeed in its purpose. Nor must the foreign official actually solicit, accept, or receive the corrupt payment for the bribe payor to be liable (...)”.

¹²⁵See the case: Monsanto, in Complaint, SEC v. Monsanto Co., No. 05-cv-14 (D.D.C. Jan. 6, 2005); Information, U.S. v. Monsanto Co., No. 05-cr-8 (D.D.C. Jan. 6, 2005).

Money or other benefits

As we have understood so far, the prohibition includes a sum of money, an offering, a gift or anything of value (Juedes, 2013; Jordan, 2016). Donations of money as well as improper payments are the hypotheses of classic corruption that was so fashionable in the seventies in the US. The giving and delivery of sums of money represent the ways in which the corruption of foreign public officials is involved. In the US the company establishes special desks where the daily activity consists of illicit payments to foreign officials (Deming, 2014a)¹²⁶. As well as the company branches and daily activities it consists in sending bribes to officials who are designated in the reporting of unofficial registers (Tsao, Kahn, Soltes, 2022)¹²⁷. The delivery takes place with classic methods such as a bag full of cash (Diamant,

¹²⁶See the case: Daimler AG, in Complaint, SEC v. Daimler AG, No. 10-cv-473 (D.D.C. Apr. 1, 2010); Information, U.S. v. Daimler AG, No. 10-cr-63 (D.D.C. Mar. 22, 2010).

¹²⁷See the case: Odebrecht/Braskem, in Plea Agreement, U.S. v. Odebrecht S.A., Cr. No. 16- 643 (E.D.N.Y., Dec. 21, 2016); Plea Agreement, U.S. v. Braskem S.A., Cr. No. 16-644 (E.D.N.Y., Dec. 21, 2016); Complaint, SEC v. Braskem S.A., Case 1:16-cv-02488-JDB (D.C. Cir., Dec. 21, 2016).

Sullivan, Smith, 2019)¹²⁸ without lacking rudimentary methods such as for example the investigation by the American authorities for the size of the bribe which was delivered to a car where the suitcase was filled with cash. In all cases these are sums of money that are foreseen in the incriminating case (Koehler, 2012).

Money is not the only means of manifestation of international corruption as it also presents itself in various forms and dimensions. In approving the subject law, Congress chooses to insert a text in the formula that it has widely desired as “anything of value” (DOJ, 1980; DOJ, SEC, 2012).

This is a broad object where the same text is defined as: “(...) the content of the notion of anything of value (...)”. A similar expression which has also been inserted into the text of the law which punishes national corruption within the US based on deemed to be included and in the ambiguity, vagueness of the provision, both tangible and intangible benefits¹²⁹, offered or received by the public agent including also the promise of a future job or a loan of money¹³⁰, or the delivery of shares which

¹²⁸See the case: Halliburton, in Complaint, SEC v. Halliburton company and KBR, Inc., No. 09-cv-399 (S.D.Tex. Feb. 11, 2009); Information, U.S. v. Kellogg Brown & Root LLC, No. 09-cr-71 (S.D.Tex. Feb. 6, 2009).

¹²⁹U.S. v. Moore, 525 F.3d 1033, 1048 (11th Circ. 2008).

¹³⁰U.S. v. Gorman, 807 F.2d 1299, 1304-5 (6th Circ. 1986).

have no commercial value¹³¹ at the moment that the application of the provision expresses and lends itself the broadest interpretation. The bribe is of any shape. International economic transactions are revealed as an illegal donation such as the consulting fee of a professional or the commission of an intermediary, the reimbursement of travel expenses and, the delivery of expensive gifts (DOJ, SEC, 2020).

Official corruption occurs in a multitude of forms that fall within the scope of the “anything of value” formula that is used by the FCPA since it is not compatible with a restrictive interpretation and the authorities provide a broader interpretation. Within this context we refer to the Schering-Plough (2004) and the Eli Lilly (2012) cases where the SEC held that the violation of anti-bribery donates funds to a foundation given that the director of the entity is the president of a public health fund due to the prestige it obtains from donations without inducements, favor pharmaceutical industries that have made the donation in the purchase of their products (Garrett, 2020)¹³².

The scope of application of the incriminating case is suitable for the promise, delivery to induce the official and to engage in

¹³¹U.S. v. Williams, 705 F.2d 603, 622-3 (2d Circ. 1983).

¹³²See the case: Schering-Plough, in Complaint, SEC v. Schering-Plough Corp., No. 04-cr- 0945 (D.D.C. Jun. 9, 2004). Eli Lilly, in Complaint, SEC v. Eli Lilly and Company, No. 12-cv-02045 (D.D.C. Dec. 20, 2012).

behavior that has to do with the agent. Gifts of low value are outside the scope of application of the case despite the absence of a decision on the matter. The only cases in which gifts of modest economic value are relevant are in cases where gifts that have to do with a complex set of systematic and long-term behaviors, i.e. are relevant without noting in themselves the methods with gifts in themselves apparently irrelevant in a narrow way that could lead to unfaithful behavior on the part of the public agent. The conduct appears to be prosecutable in its overall composition, excluding the fact that individual gifts of modest value may fall within the scope of application of the incriminating case (DOJ, SEC, 2012).

The gifts are complex and regardless of their value (Warin, Diamant, Peenning, 2011) have to do with the goods and services that multinationals purchase to show their gratitude and with respect for the public managers who interface in their business and which are improper in light of the incriminating case. Small gifts seem suitable to influence the choices of officials and their legitimate ones are thus in line with the promotion of good economic relations and commercial transactions. Travel expenses to tourist destinations and payment for recreational activities are prohibited by the anti-bribery provisions. This is a topic that enters the international context of practices of this type where

good faith can frequently be found within the corporate policy of many companies. The law in question (FCPA) does not contain an exception to the criminal relevance of gifts of modest value (de minimis exception) (Koehler, 2012; Deming, 2014b).

The difference between carrying out and authorizing the conduct

According to the FCPA, it is forbidden to give, promise, offer money or other benefits to the person who physically carries out the typical conduct, even to the person who can authorize him to act. The provision not only punishes the misleading of the public agent but also materially authorizes corruption that occurs through a different person (Deming, 2014b).

The law does not clarify the minimum content of the authorization which is punishable according to the offending case. The subject is that who authorizes the questionable payment to a subject where the identity is known and/or authorizes another subject who acts by doing what is necessary to bribe the public agent without determining the price of the corruption and delegating the operational subject of determine the methods and extent of the conduct¹³³.

¹³³See, Innospec (2010). Complaint, SEC v. Innospec, Inc., No. 10-cv-448

The case does not require and does not explicitly authorize behaviors that are not corrected in the normal way and are tolerated with a silence that constitutes a source of responsibility in the manager in a top position who tolerated a conduct of a corrupt nature (Deming, 2014b).

This is a criminally relevant formulation for the authorization conduct which concerns the giving, the promise and/or the offer which does not occur as well as international corruption not occurring when it does not achieve the objective desired by the agent. This is a choice that anticipates the protection of legal assets and makes behaviors that pave the way for corrupt conduct according to the spirit of the FCPA where the case is subject to the same criminal sanction as punishable (Tarun, Tomczak, 2018). The approval provides the fund with the economic and foreign subsidiarity availability if managers and administrators do not limit the field of use sufficiently and in a specific manner, thus avoiding of being the economic source for corruption¹³⁴.

(D.D.C. Mar. 18, 2010); Information, U.S. v. Innospec, Inc., No. 10-cr-61 (D.D.C. Mar. 17, 2010).

¹³⁴Which the authors affirmed that: “(...) vagueness of the regulatory provision on the notion of “authorization”, explicit and implicit behaviors must be considered included in it, especially in those dubious circumstances, in which those responsible have not a priori expressed their disapproval and formal dissent towards any inappropriate payments, at the same time taking

Corrupt conduct

To pursue conduct that does not reach that of an agent is a difficult argument to prove given that we need, as we understood from the previous paragraphs, the bestowal, promise and, offer that has precisely this objective. Selecting criminal behaviors through the investigation of the subjective element shows that the agent must voluntarily carry out the conduct that can be demonstrated corruptly (Tarun, Tomczak, 2018).

This is the application of the case which has taken on the nature of a subjective element. Its location opens up the arrangement and proximity of essential elements with the conduct and methods of commission which also seems partly of a bivalent nature. The agent is punished and acts with the intent to corrupt where the conduct is effectively defined as corruptly to achieve the objective and reasoning in terms of offensiveness which possess the characteristics that make it capable of influencing the public agent. We can interpret as corruptly the conduct that follows the subtraction from incrimination of donations, promises, offers that are not suitable for achieving one's

every action necessary to prevent their implicit consent or acquiescence to such practices from even appearing (...)"

objective.

(Follows): Direct or indirect punishment

The giving, promise, offer as well as the authorization to follow it in the case in which the money or benefits are directed to the foreign public official in a direct or indirect way are prohibited by the FCPA. It is prohibited: “(...) to any person, knowing that all or part of that money or benefit will be offered, given or promised, directly or indirectly, to a foreign official, a foreign political party or its official, or a candidate for a foreign political office (...)”¹³⁵.

The criminal conduct can be corrupt either directly or indirectly and extends its prosecutability to gifts, promises and offers that reach the public official also indirectly through intermediaries. The FCPA has sought to sanction over 90% of cases involving bribes paid by intermediaries, consultants and business partners directly and/or promised by the agent¹³⁶.

Intermediaries are explained by factors that have to do with the structure and operations of the multinational. The multinational's territorial structure hardly covers its staff. Thus external parties

¹³⁵15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

¹³⁶Stanford Law School's Foreign Corrupt Practices Act Report Clearinghouse, 2017: <https://fcpa.stanford.edu/>

such as third ones carry out activities that do not represent the core business of the company such as the sales activity of the products and services offered by the multinational. And this was pre-established given that the American reality has shown through old surveys that already 80% of multinationals had relationships with commercial partners, agents, external distributors or established joint ventures with third parties to continue their business even outside American borders¹³⁷.

The outsourcing of sales functions to specialized entities reduces company costs and focuses its activity on important sectors such as production, research, development, supporting sales and turnover growth. In other sectors or territories it is important to resort to the support of a local commercial partner who knows the market and which constitutes a requirement in the local law given that the activity allows for a national market. The choices achieved are appropriate and necessary to facilitate the use of questionable payments in the conduct of business that are outside the operations of the multinational enterprise and which escape the internal control systems according to the terms of prevention and repression of such conduct. The criminalization of corrupt practices that are committed indirectly allows us to avoid

¹³⁷Kroll/Compliance Week, Anti-Bribery and Corruption Benchmarking Report, 2013, op. cit.

outsourcing choices in an appropriate way from the company to third parties, thus allowing corruption of foreign public officials to remain outside the anti-bribery provisions and therefore they will be unpunished (Tarun, Tomczak, 2018).

The liability of third parties in terms of corporate compliance constitutes the main source of risk within the context of international economic transactions (Koehler, 2012)¹³⁸. A direct relationship of dependence through an intermediary with the relevant multinational is not necessary given that the corrupt behavior is considered “on behalf” of the same and that it is necessary to express itself within the multinational enterprise which involves ambiguous conduct that pursues the purpose and

¹³⁸Koehler underlines how: “(...) the use of “third parties” constitutes, in fact, an advantage that multinational enterprises frequently use when conducting their business in foreign territory. A local partner, in fact, knows the local economic, social and entrepreneurial reality and can count on professional relationships with the main economic players present locally, all qualities that can undoubtedly help the economic initiative undertaken to be successful. It is therefore quite common to resort to foreign partners when conducting business outside one's own territorial borders, and in some jurisdictions it is even a legal requirement to be able to operate (...) a largely positive aspect can constitute a primary source of risk, since-remaining subject to the FCPA-the multinationals may still be liable for the questionable payments carried out by “third parties” (...)”.

which influence the conduct of the public agent through the third parties (Deming, 2014b).

Anti-corruption policies are few or non-existent to address the relative risk for the multinational enterprise, thus leading to collaboration with third parties and carrying out work to circumvent internal controls which would prove ineffective towards one of the main sources of corruption risks in themselves inadequate to the diffusion among company employees who are mistakenly convinced of an intermediary recourse to external parties who exclude criminal liability deriving from corrupt conduct committed outside national borders. This attitude is a problem for corporate compliance because it acts negatively for society, making the organizational model in itself inadequate which does not take into account the source of risk that promotes criminal behavior and the related criminal liability of both an entity and an individual (Tarun, Tomczak, 2014). The criminalization of corrupt conduct committed and/or by third parties is an obligatory choice for Congress which has taken into consideration the approval and spirit of the FCPA as well as the anti-bribery provisions which are ineffective when the law has allowed that the questionable payments to foreign public officials are conveyed and hidden people/entities such as intermediaries (Koelher, 2012).

After the modification of the text of 1988 the third parties are taxable subjects of the case. Thus establishing intermediate taxable subjects who respect them in a strict sense, such as foreign public officials. The need to anticipate protection when the conduct assumes the danger of the legal good in the rules of the FCPA and the responsibility of the entity and the agent for donations to intermediaries in criminal liability with direct way for corrupt practices, exclude that the same is a preliminary conduct for corruption and influence peddling.

Passive subjects

The figure of the public official is important for the criminal offense which, according to the FCPA, prohibits the offer, promise of a sum of money or other benefit to foreign public officials to obtain and maintain business from the agent. Thus the case and its concrete application take on a role, as well as the conduct of the subjective element and the correct identification of taxable subjects (Koehler, 2012). The three anti-bribery provisions of the FCPA included in the figures such as issuers, domestic concerns and other persons provide that taxable subjects include foreign public officials¹³⁹; -foreign political

¹³⁹15 U.S.C. §§ 78dd-1(a)(1) for the “issuers”; 78dd-2(a)(1) for the

parties and/or officials of these parties, as well as candidates for their participation in a foreign political position¹⁴⁰; - anyone who acts when he already knows that a part of the money or benefits is offered corresponds to one of the subjects just referred to (Peersson, Tabellini, Trebbi, 2003)¹⁴¹. Therefore we can speak of three categories of taxable subjects for the application of the relevant case.

(Follows): Foreign public official

According to the FCPA, a foreign public official is: “(...) any officer or employee of a foreign government, of a department, agency or body instrumental thereto, or of an international public organization, as well as anyone acting officially in the name or on behalf of themselves (...)” (Cohen, Holland, Wolf, 2008; Harisiadis, 2013; Hughers, 2013; Cramer, 2015)¹⁴².

The foreign public official according to the FCPA who is the

“domestic concerns”; 78dd-3(a)(1) for the “others”.

¹⁴⁰15 U.S.C. §§ 78dd-1(a)(2) for the “issuers”; 78dd-2(a)(2) for the “domestic concerns”; 78dd-3(a)(2) for the “others”.

¹⁴¹15 U.S.C. §§ 78dd-1(a)(2) for the “issuers”; 78dd-2(a)(2) for the “domestic concerns”; 78dd-3(a)(2) for the “others”.

¹⁴²15 U.S.C. §§ 78dd-1(f)(1)(A) for the “issuers”; 78dd-2(h)(2)(A) for the “domestic concerns”; 78dd-3(f)(2)(A) for the “others”.

recipient of the offer or donation of money or other activities has a broad interpretation which includes the subjects who hold top positions according to the representative bodies such as the parliamentary chambers which hold government positions, subjects with functions top management, mere employees of foreign governments, governmental or representative¹⁴³.

It is not so easy to present and identify the content of the notions of department, agency and instrumentality of a foreign government (Berger, Sheehy, Davis, 2007; Bennett, Hartigan, 2011; Hagenbuch, 2012; Davis, Raskin, Moss, Dunst, 2012; Long, 2013; Epner, 2013; Boedecfker, 2015) given that public functions depend on the organizational structure that has been established when the official is not formally employed directly by a foreign government and does not exclude that the functions performed are of nature, public purposes (Deming, 2014a)¹⁴⁴. It is

¹⁴³DOJ, SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA), op. cit., p. 25.

¹⁴⁴Deming underlines that: “(...) the anti-corruption provisions also apply to the structures of the foreign government, in the form in which they are structured by the latter. As parastatal entities or controlled by the foreign state, they fall within the scope of criminal protection expressed in the FCPA, and the officials who work there or who operate on their behalf are themselves taxable subjects of the FCPA since, due to the aforementioned characteristics of the entity, they perform a public function. The “public function” represents, then, the key to understanding the scope of application

necessary to give weight to the fact that international corruption concerns the category of subjects that does not belong in a formal sense such as the government bodies where their employees carry out work but rather categories of officials, employees of entities that are controlled by the government of the foreign state such as the publicly held company (Koehler, 2012)¹⁴⁵.

In practice, the FCPA expresses principles that are also applicable to multinationals. The rulings adopt a substantial approach with an illustrative manner and based on the qualification of the investigated entity which is connected with the government of a

of the anti-corruption cases of the FCPA, in which the formal component clearly gives way to the need to proceed with a substantial approach. As we will see, this is the approach followed in the agreements for the negotiated resolution of international corruption cases and, above all, in the judicial rulings that are recorded on the matter in the United States (...)."

¹⁴⁵Koehler observes that: "(...) from the preparatory work of the FCPA, it would indeed emerge that Congress intends not to include, in the notion of foreign public official, also managers and employees of publicly held companies, so much so that the legislative proposals in this sense they were not accepted, and in fact in the text of the law that came into force there is no explicit reference to companies owned or controlled by the state. However, the application of the FCPA has gone in a different direction, since many of the international corruption cases opened by the US authorities have concerned, especially in recent times, public companies (...)."

foreign state where the officials cover the figure of foreign public officials, taxable subjects according to the provisions of the FCPA and the related liability penalty according to the multinational covering their work¹⁴⁶. The aspects of the investigation focus on the following aspects: the ownership, control, condition and function of the entity under investigation (DOJ, SEC, 2020). The factors identified in the rulings are the following: “(...) - the extent of participation in the capital of the entity by the foreign state; -the degree of control over the entity by the foreign state (e.g. in the case of appointment or replacement of administrators and general managers by the government); -the degree of characterization of the entity and its employees with respect to the foreign state; -the circumstances underlying the establishment of the entity (e.g. the formal designation of the entity by the foreign state); -the purposes pursued by the organization with its activity; - the facilities and obligations of the entity according to the laws of the foreign state; -the exclusive or controlling power given to the entity in

¹⁴⁶Order, U.S. v. Carson 2011 WL 5101701, No. 09-cr-77 (C.D. Cal. May 18, 2011), ECF No. 373; U.S. v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); Order, U.S. v. Esquenazi, No. 09-cr-21010 (S.D. Fla. Aug. 5, 2011), ECF No. 309; Order, U.S. v. O’Shea, No. 09- cr-629 (S.D. Tex. Jan. 3, 2012), ECF No. 142; Order, U.S. v. Nguyen, No. 08-cr-522 (E.D. Pa. Dec. 30, 2009), ECF No. 144.

administering its designated functions (e.g. the monopoly regime); -the level of financial support it receives from the foreign state (including, for example, subsidies or loans, special tax regimes, commissions paid to the state, partial cost coverage by the state for the services provided by the entity); - the provision of services by the entity to residents of the foreign country; -the general perception that the entity is carrying out public or government functions; -the breadth of the time span in which these indices were present (...)” (DOJ, SEC, 2020; Kang, 2023)¹⁴⁷.

As can be understood, the qualification of the foreign public official is identified through the public functions carried out by the institution to which he or she belongs. The identity of the official leads to the incrimination of the conduct which will be sufficient as a result that is connected with the entity under investigation. The FCPA does not consistently require official identification as it punishes giving to an intermediary to facilitate public official corruption (Koehler, 2012; Smith, 2017)¹⁴⁸

¹⁴⁷U.S. v. Esquenazi, 2014 U.S. App. LEXIS 9096 (11th Cir. May 16, 2014), cert. denied., No. 14-189 (Oct. 6, 2014).

¹⁴⁸SEC v. Jackson, 908 F. Supp., 2d 834 (S.D. Tex. 2012), in which the judge observes: “(...) that it would be “deviant” to imagine that the FCPA requires precise knowledge of the defendant regarding which foreign official is affected by the corruption and at what level of government he is placed,

although it actually qualifies¹⁴⁹.

International public organizations

Officials and employees of international public organizations are among the taxable subjects of anti-corruption cases. The FCPA defines the notion of “public international organization” as the organization that establishes the first Section of the International

since the accused could always defend himself by claiming that his agent did not tell him exactly which officer he had bribed (...). SEC v. Sraub, 2013 WL 466600 (S.D.N.Y. 2013), in which the judge states: “(...) that an interpretation that requires exact knowledge of the corrupt official would be in conflict with the letter of the law, which - on the contrary - punishes conduct such as offers or promises which do not even require, for their prosecution, that the foreign public agent accepts or reveals his exact identity. On the contrary, the fact that the law punishes any person, even an intermediary, who facilitates the corruption of the official suggests that the conduct contemplated by the provision only requires that the agent knows that the illicit payment has as its ultimate recipient a foreign public official, without that knowledge of his precise identity is required (...)”. U.S. v. O'Shea, Trial Tr. 227:19-23, No. 09-692 (S.D. Tex. Jan. 16, 2012), in which the judge instead observes: “(...) that one cannot condemn a man who promises a payment without specifying the content of the promise, the exact identity of the recipient and the benefit that the conduct aims to achieve (...)”.

¹⁴⁹U.S. v. Carson, op. cit.

Organizations Immunities Act (1945) and/or that identifies as an institution the creation for individuals who are part of this section and with order of execution of the President¹⁵⁰. The main international public organizations are also registered in the American government register, such as UNICEF, FAO, WHO, the World Bank and the Inter-American Development Bank, as well as political institutions such as the UN, the Council of Europe and the European Union.

A broad interpretation of the international public organization confirms the prosecutability of conduct involving established bodies participating in a multitude of states such as the European Bank for Reconstruction and Development. The dependencies and function of the taxable subject of the conduct as a minimum connection with the foreign government are essential to the configurability of the crime and the entity¹⁵¹.

¹⁵⁰22 U.S.C. § 288.

¹⁵¹ U.S. v. Harder, 168 F. Supp. 3d 732, 739 (E.D. Pa. March 2, 2016), in which the judge observed that: “(...) officials and employees of a body made up of a multitude of states fall within the scope of application of the case (...)”.

(Follows): The royal families

Much discussed at an international level is the influence on a political level of spending decisions on a foreign government. Thus the qualification of foreign public officials is an issue that determines their employment as a local sponsor of the multinational enterprise and the provisions of the FCPA. The text did not exclude the royal families among the relevant subjects.

A topic that was addressed at the DoJ through the procedure established by law belonging to the royal family of a country which in itself exerts influence on government bodies such as a foreign official. The influence is concentrated on: “(...) - the structure and distribution of power within the government; -the current legal condition and powers of the royal family, as well as the evolution over time; -the position of the individual within the royal family; -having or having carried out government functions; -the mechanisms for access to government functions; - the ability of the individual to influence, directly or indirectly, government decisions (...)”¹⁵².

The case-by-case assessment qualifies the member of a royal family as a foreign public official who determines the illicitness of the payment, offer or promise. Thus the multinational first

¹⁵²US, Department of Justice: Opinion Procedure Release, No. 2012-01 (September 18, 2012): <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/09/27/1201.pdf>

refers to the relevant authorization obtained. As well as a subsidiary criterion which attributes the qualification of foreign public agent where the individual does not hold government functions and which are envisaged by the case as relevant in themselves. The government does not participate directly in all its aspects but the royal family does as an external, local sponsor for the responsibility of the multinational.

Political parties and candidates

Foreign political parties, officials of these parties and foreign candidates for political office enter to the FCPA anti-corruption system¹⁵³. The relevant text does not provide an ad hoc definition for this category of taxable persons. A coherent interpretation of the anti-corruption provisions of the FCPA formally favors the category in question of subjects who do not form their candidacy and who have left it to subjects who have not assumed the role within international organizations and who exercise influence behind the scenes (Deming, 2014b).

Politically motivated taxable subjects have political relevance and assume contributions to the functioning of the electoral

¹⁵³15 U.S.C. §§ 78dd-1(a)(2) for the “issuers”; 78dd-2(a)(2) for the “domestic concerns”; 78dd-3(a)(2) for the “others”.

campaigns of political subjects where the country of the multinational conducts concrete business. To avoid criminal charges, the multinational provides that its internal policy expressly prohibits its agents, commercial partners or external consultants who make electoral contributions in the name and on behalf of the company. The general prohibition of a donation is examined and approved within the relevant department of the multinational or by external lawyers. Its lawfulness also results in compliance with the regulations for the destination of the funds (Tarun, Tomczak, 2018).

It is quite difficult to imagine the electoral contribution of a candidate or a member of a direct political party that does not in itself appear to fall within the incriminating case. The selection of behaviors are worthy for sanction, which are part of the responsibility of the subjective element. Financial support is for party candidates pursues political action on issues that concern the fundamental freedoms of the natural person. The legal person as well as the multinational has a collateral purpose which without anything else constitutes the pursuit of improving social conditions for stakeholders who are different from shareholders such as for example stakeholders, the local or national community where the company carries out its economic activity and the achievement of profit.

(Follows): Intermediaries

According to the FCPA, yet another category of taxable subjects in the anti-corruption provisions are intermediaries who are members of a foreign political party, an official, a candidate for a foreign political office¹⁵⁴.

This is a category that constitutes the figure of the structure of the case in its application. Intermediaries as passive anti-corruption subjects are of greater importance to avoid the circumvention of the FCPA which persecutes conduct involving third parties (Koehler, 2012).

The very nature of multinationals is that they offer and purchase goods and services outside national borders. The character of transnationality is aimed at economic and legal contexts that are different from the one of origin where the company supports local, natural or legal persons who ensure the necessary assistance in conducting business within the territorial reality, to the peculiar customs trying to facilitate economic transactions through illicit practices such as corruption. The criminalization of “third parties” appears to be indispensable for the multinational

¹⁵⁴15 U.S.C. §§ 78dd-1(a)(3) for the “issuers”; 78dd-2(a)(3) for the “domestic concerns”; 78dd-3(a)(3) for the “others”.

given that its responsibility in the case of bribes is given to promises that the company itself directly makes in its directors, managers or employees as well as in the intermediary (DOJ, SEC, 2020).

Within this context we recall the case of the ENI in Nigeria where international corruption operates directly from the company and through agents who procure the same foreign order (Deming, 2014b)¹⁵⁵. Agents have a crucial role in the physiology of transnational corruption dynamics. The third parties behave as “agents” who are attributed civil and criminal liability deriving

¹⁵⁵See the case: Bonny Island, in Criminal Information, U.S. v. Marubeni Corp., No. 12-cr- 22 (S.D. Tex. Jan. 17, 2012), ECF No. 1; Criminal Information, U.S. v. JGC Corp., No. 11-cr-260 (S.D. Tex. Apr. 6, 2011), ECF No. 1; Criminal Information, U.S. v. Snamprogetti Netherlands B.V., No. 10-cr-460 (S.D. Tex. Jul. 7, 2010), ECF No. 1; Complaint, SEC v. ENI SpA and Snamprogetti Netherlands B.V., No. 10-cv-2412 (S.D. Tex. Jul. 7, 2010), ECF No. 1; Criminal Information, U.S. v. Technip S.A., No. 10-cr-439 (S.D. Tex. Jun. 28, 2010), ECF No. 1; Complaint, SEC v. Technip, No. 10-cv-2289 (S.D. Tex. Jun. 28, 2010), ECF No. 1; Indictment, U.S. v. Tesler, et al., No. 09-cr-98 (S.D. Tex. Feb. 17, 2009), ECF No. 1; Complaint, SEC v. Halliburton Company and KBR, Inc., No. 09-cv-399 (S.D. Te. Feb. 11, 2009), ECF No. 1; Criminal Information, U.S. v. Kellogg Brown & Root LLC, No. 09-cr-71, ECNo. 1 (S.D. Tex. Feb. 6, 2009), ECF No. 1; Criminal Information, U.S. v. Stanley, No. 08-cr-597 (S.D. Tex. Sept. 3, 2008), ECF No. 1.

from corrupt conduct on the part of the multinational enterprise where they act with interest¹⁵⁶. The giving, promise and offer makes a part of the money go to corruption. The behavior of the third party entails a criminal sanction for the multinational by ascertaining awareness of the final destination of the sums. The rule imposes as a positive requirement the awareness and belief of the probability and the corruptive destination of the sums given, promises or offers are thus established by the FCPA. “(...) The state of a person's mind is “knowing”, with respect to a conduct, a circumstance or a result if: - such person is aware of the fact that is engaged in such conduct; that such circumstance exists or that such result is substantially certain; or this person is firmly convinced that such a circumstance exists or that such a result is substantially certain (...)”¹⁵⁷.

Therefore the FCPA does not allow indictment when the agent is

¹⁵⁶Complaint, SEC v. Johnson & Johnson, No. 11-cv-686 (D.D.C. Apr. 8, 2011); Criminal Information, U.S. v. DePuy, Inc., No. 11-cr-99 (D.D.C. Apr. 8, 2011) ECF No. 1; Complaint, SEC v. ABB, Ltd., No. 10-cv-1648 (D.D.C. Sept. 29, 2010), ECF No. 1; Criminal Information, U.S. v. ABB Inc., No. 10-cr-664 (S.D. Tex. Sept. 29, 2010), ECF No. 1; Criminal Information, U.S. v. Int’l Harvester Co., No. 82-cr-244 (S.D. Tex. Nov. 17, 1982).

¹⁵⁷15 U.S.C. §§ 78dd-1(f)(2)(A) for the “issuers”; 78dd-2(h)(3)(A) for the “domestic concerns”; 78dd-3(f)(3)(A) for the “others”.

fully aware and has direct and precise knowledge but when the agent is convinced on the basis of the factual circumstances that take into account. The same provision states that: “(...) when knowledge of the existence of a particular circumstance is required for the commission of a crime, the knowledge requirement is satisfied if a person is aware of a high probability of the existence of such circumstance, unless the person really believes that such circumstance does not exist (...)”¹⁵⁸. So the law does not require full knowledge which is sufficient for the person who acts convinced with the high probability that part of the sums given, offers, promises are intended by the intermediary to bribe a foreign public official in order to prevent prosecution. It is, however, excluded when the agent tries to avoid having direct knowledge of that circumstance.

The formula has the objective of avoiding the avoidance of incriminating cases of behavior: “(...) of conscious or intentional ignorance of willful blindness in which the agent opportunistically hides his head in the sand and does not oppose the perpetration of international corruption (...)” (DOJ, SEC, 2020).

The relevant ascertainment assessment must be made on the basis

¹⁵⁸ 15 U.S.C. §§ 78dd-1(f)(2)(B) for the “issuers”; 78dd-2(h)(3)(B) for the “domestic concerns”; 78dd-3(f)(3)(B) for the “others”.

of the circumstances that are present in the concrete case of prevention. The multinational enterprise can base its decision on some symptomatic indicators which constitute a revealing indicator of the possibility that the ultimate destination of the intermediary's conduct is (or has been) the corruption of a foreign official. These indices are: -the excessive amount of commissions paid to external agents and consultants; -the unreasonable value of discounts granted to external distributors; -the level of clarity and precision with which the consultancy services are described in the stipulated contracts; -the area of expertise of the external consultants, if different from that for which they were hired; -the degree of kinship or closeness of the agent or consultant to the foreign public official; -the corporate capacity of the agent or consultant, if constituted by an empty box or incorporated in an offshore jurisdiction; -the destination of payments for the collaboration, if directed towards (or channeled through) offshore current accounts; -the reputation of the intermediary and the local context in which it operates; -the degree of lack of depth in communications regarding the progress of the collaboration with the intermediary, or the presence of anomalous information (...)"¹⁵⁹.

¹⁵⁹See the Kozeny case, in U.S. v. Kozeny, 582 F. Supp. 2d 535 (S.D.N.Y. 2008).

These are red flags where the authorities reconstruct ex post an implicit awareness based on the agent's conduct. The same flags that result from the multinationals where the foundations build the corporate compliance program. This forming the basis for criteria that modulate the adequate due diligence of the intermediary thus foreseeing the possible conduct of international corruption which is concluded by the intermediary and which entails the criminal liability of the multinational¹⁶⁰.

The red flags in the compliance program and in due diligence constitute an essential basis for an anti-corruption policy that is effective in preventing the criminal liability of the entity. It is difficult to talk about liability for negligence. The object of the investigation is the explicit or implicit knowledge of the illicit destination of the sums given, offers and promises. The FCPA considers the probability of knowledge as sufficient knowability on the basis of the indices that are symptomatic where the analysis of the recurrence in the concrete situation leads to excluding the responsibility of the multinational (Koehler, 2012).

¹⁶⁰See the Jackson case, in SEC v. Jackson, No. H-12-0563 (KPE), 2012 WL 6137551 at 11 (S.D. Tex. Dec. 11, 2012). The case Straub, in Mem. e Order, SEC v. Straub, No. 11 Civ. 9645 (RJS) (S.D.N.Y. Feb. 8, 2013).

Specific intent in the subjective element

The conduct of international corruption for the prosecution of this type of conduct and the verification of two requirements regarding the subjective element requires the corruptly and willfully terms. It is requested that the conduct constitutes corrupt intent under the provisions of the FCPA. This is a requirement that is applicable to natural and legal persons. Proof of individual prosecution is required for violations of the FCPA that are committed with willfulness. A second requirement which is not required for the attribution of criminal responsibility to the multinational entity (Koehler, 2012). These requirements are important for the prosecutability of the entity.

The corruptive purpose

The cases that include corruption according to the FCPA select the conduct that is abstract of being prosecutable and according to the purpose of the agent, committed with the intent to corrupt¹⁶¹.

We take into consideration that the FCPA does not define corruptly, even in the preparatory works it was intended to

¹⁶¹15 U.S.C. §§ 78dd-1(a) for the “issuers” 78dd-2(a) for the “domestic concerns” 78dd- 3(a) for the “others”.

attribute the same meaning that the term assumes in the context of the provisions against national corruption. For incrimination it is required that the conduct imposes the intention of the desire to influence in an illegal way the final recipient of the sums and the foreign public official (DOJ, SEC, 2020). The term “corruptly” includes the anti-legal behavior that animates a motive that we can characterize as despicable¹⁶² given that it is contrary to the law, to the desire to influence the foreign public official in the sense of obtaining and maintaining economic advantages in a similar way and as foreseen by the provisions that are foreseen for national corruption¹⁶³.

The FCPA provides some indication of the outcome towards corrupt conduct which provides where the offer, giving and promise are corrupt purposes with the aim of: “(...) influencing an act or decision of a foreign public official in the exercise of its functions¹⁶⁴; -induce a foreign public official to do or omit an act in violation of official duties, or in general, to secure an undue

¹⁶²FCPA speaks for the “evil motive or purpose”.

¹⁶³House Report, No. 95-640, p. 7, also the Senate Report, No. 95-114, p. 10. See also: 18 U.S.C. § 201(b).

¹⁶⁴15 U.S.C. §§ 78dd-1(a)(1)(A)(i), 78dd-1(a)(2)(A)(i), 78dd-1(a)(3)(A)(i), for the “issuers” 78dd-2(a)(1)(A)(i), 78dd-2(a)(2)(A)(i), 78dd-2(a)(3)(A)(i) for the “domestic concerns” 78dd-3(a)(1)(A)(i), 78dd-3(a)(2)(A)(i), 78dd-3(a)(3)(A)(i) for the “others”.

advantage¹⁶⁵; -induce a foreign public official to use his influence with a foreign government or a branch thereof in order to alter or influence their act or decision (...)”¹⁶⁶.

The provisions exclude the purpose of the agent from the constituent elements, thus configuring the crime of corruption as in specific intent. This choice allows criminal protection to be brought forward to a moment that dates back to the corruption agreement which is not described as a constitutive element of the crime. After ascertaining the corrupt intention, the offer, promise and giving are integrative elements of the case which make the agent liable to prosecution (Tarun, Tomczak, 2018). The offer and promise are solicited, accepted and payment is received by the public agent when such conduct remains unrelated to the typical cases (Deming, 2014a; Lowell Brown, 2016)¹⁶⁷. The

¹⁶⁵15 U.S.C. §§ 78dd-1(a)(1)(A)(iii), 78dd-1(a)(2)(A)(iii), 78dd-1(a)(3)(A)(iii), for the “issuers”, 78dd-2(a)(1)(A)(iii), 78dd-2(a)(2)(A)(iii), 78dd-2(a)(3)(A)(iii) for the “domestic concerns” 78dd-3(a)(1)(A)(iii), 78dd-3(a)(2)(A)(iii), 78dd-3(a)(3)(A)(iii) for the “others”.

¹⁶⁶15 U.S.C. §§ 78dd-1(a)(1)(B), 78dd-1(a)(2)(B), 78dd-1(a)(3)(B), for the “issuers” 78dd-2(a)(1)(B), 78dd-2(a)(2)(B), 78dd-2(a)(3)(B), for the “domestic concerns” 78dd-3(a)(1)(B), 78dd-3(a)(2)(B), 78dd-3(a)(3)(B), for the “others”.

¹⁶⁷See the case: Esquenazi, in Jury Instructions, U.S. v. Esquenazi, op. cit., pp. 22-23. The Green case, in Jury Instructions, U.S. v. Green, No. 08-cr-59 (C.D. Cal. Sept. 11, 2009), ECF No. 288, p. 10. The Jefferson case, in Jury

intention to prosecute comes true¹⁶⁸ when the crime is considered to have been committed and the promised payment is not made¹⁶⁹. The case focuses on the conduct where the corruptor's bad faith carries out, authorizes the giving, offering and promising, considering the crime of international corruption as integrated when the agent has authorized the payment to foreign public officials and indefinitely seen that the conduct considers all the characteristics that are part of the disposition, i.e. the corrupt action and intention.

Instructions, U.S. v. Jefferson, No. 07-cr-209 (E.D. Va July 30, 2009) ECF No. 684, p. 35. The Bourke case, in Jury Instructions, U.S. v. Bourke, No. 05-cr-518 (S.D.N.Y. July, 2009), p. 25. The Kay case, in Jury Instructions, U.S. v. Kay, No. 01-cr-914 (S.D. Tex. Oct. 6, 2004), ECF No. 142, p. 17. The case Mead, in Jury Instructions, U.S. v. Mead, No. 98-cr-240 (D.N.J. Oct., 1998).

¹⁶⁸Monsanto, in Complaint, SEC v. Monsanto Co., op. cit.

¹⁶⁹Innospec, in Complaint, SEC v. Innospec, Inc., op. cit. supra nota 401 and Information, U.S. v. Innospec, Inc., op. cit.

Willingness to act against the law and the awareness of the individual who commits it

According to the FCPA, for natural persons, criminal liability requires yet another element that is not indispensable for the entity, namely the conduct that is taken into consideration according to the agent who willfully commits a criminal action (Friedman, Smiethline, 2012). The text does not define the term “willfully” which has found jurisprudential application as a synonym for voluntariness in acting in a manner contrary to the general principles of law which includes one's actions in an “incorrect” way (Koehler, 2012). From the preparatory work we noticed the ability to understand the incorrectness of one's behavior and the willingness to put it without asking given that the fact is criminally relevant and the agent is certain that his behavior constitutes a criminal offense which has set the purpose of violate the law (Garapon, 2013)¹⁷⁰. According to jurisprudence it is sufficient to acquire proof that the subject is aware of having acted in a manner contrary to the principles of law and with this method of pursuing the corruptive purpose which constitutes the object of the fraud¹⁷¹.

¹⁷⁰House Report, op. cit.

¹⁷¹See the Kay case, in U.S. v. Kay, 513 F.3d 432 (5th Cir. 2007).

Object of the fraud

The FCPA describes as an illicit objective what the agent pursues in a precise manner by referring to the intent that influences the act or a decision of a foreign public official in the exercise of his duties and to induce, do, or omit an act in violation of official duties and to ensure an undue advantage and to induce one to use one's influence to a foreign government and to alters, influences an act and one's decision. These are mediated purposes where the purpose that pursues the agent is not corruption as an end in itself but rather the advantage that the agent aims to obtain. The FCPA states that: “(...) the offer, promise and giving, authorized or made, are actionable because they are committed for the purpose of influencing the foreign official so as to receive assistance in obtaining or maintaining business, for or with someone, or direct them towards someone (...)”¹⁷² economic or commercial purpose of international corruption (...) business purpose test in the absence of which it will be difficult to maintain that illicit conduct has occurred, in violation of the FCPA (...)”¹⁷³.

¹⁷²15 U.S.C. §§ 78dd-1(a)(1) last period, 78dd-1(a)(2) u.p., 78dd-1(a)(3) u.p., for the “issuers” 78dd-2(a)(1) u.p., 78dd-2(a)(2) u.p., 78dd-2(a)(3) u.p. for the “domestic concerns” 78dd-3(a)(1) u.p., 78dd-3(a)(2) u.p., 78dd-3(a)(3) u.p. for the “others”.

¹⁷³House Report, No. 95-831, p. 12.

The economic or commercial purpose demonstrates the factual circumstances such as for example the characteristics of the advantage in terms of economic value and/or the amount of gifts, i.e. expensive gifts and trips. The lack of evidence that allows to demonstrate that the agent aims to obtain an economic advantage hardly considers the corrupt intent as proven (Tarun, Tomczak, 2018).

Ascertaining the economic or commercial purpose does not require an in-depth examination of the consequences of the illicit conduct given that the interests pursued by the agent must be real and presented when the same comes into consideration without the actual realization of the advantage. The function of selecting behaviors are criminally relevant and the formula assumes, generates an in-depth debate that attempts to define the contours of a requirement that in reality escapes.

The FCPA punishes conduct as we have seen “in order to obtain or retain business”. The term business is not specified as it refers only to public contracts. The lack of a reference to government contracts excludes a restrictive interpretation that excludes the criminal relevance of payments to foreign public officials that do not fall within the specific typology.

American law attributes to behaviors that are criminally relevant such as for example the business activity that has the objective of

selecting a wide range of possible payments to foreign public officials which due to their characteristics may fall within the scope of application, which has a definitive nature and in a way that is not excessively clear from the law itself. Also at this point the preparatory works have clarified that the text that was approved does not limit the prosecution of payments made to obtain business through the adoption of provisions of the public body such as for example the note for public contracts but rather the scope of application of the case which is part of the public intervention that is suitable to support the maintenance and accreditation of a business. This interpretation appears to adhere to the letter of the law which expands the scope of application of the case such as for example the granting of licences, qualifications or preparatory permits to the start-up or continuation of an economic activity¹⁷⁴.

The FCPA is available to provide few jurisprudential insights towards natural persons. It is controversial to understand what is included in the scope of the ban, the procedures that are related to customs duties, taxes, licenses and permits (Koehler, 2012). The district courts have already favored a restrictive interpretation of the legislative text. In the Duran case we saw the acceptance of the request by the judge in case of dismissal of the proceedings

¹⁷⁴House Report, No. 95-831, op. cit.

which has as its object the alleged illicit payments to officials of the Dominican Republic who follow and obtain the release of two planes, thus observing the type of payments that are subjected to the judgment of the court and which are susceptible to criminal sanctions according to the FCPA (Koehler, 2007)¹⁷⁵.

We continue with the Kay case which had to do with the president and vice president of an American multinational. They are accused of paying officials in Haiti to obtain reductions in customs duties and taxes owed. The district court stated that: “(...) the text of the law was vague and susceptible to broad interpretation”. From the preparatory works it was possible to deduce that the legislator intended to attribute criminal relevance only to some payments and not to all those susceptible to influence the most varied decisions of the foreign public official. Thus a restrictive interpretation of the provision had to be preferred, which consequently excluded that the reduction of a company's customs and tax costs could be considered objectives included in the text of the FCPA¹⁷⁶. Follows the Mattson case, in which the employees of a company were accused of having made liberal donations to an Indonesian official to obtain a reduction in

¹⁷⁵See the Duran case, in Judgment of Acquittal, U.S. v. Duran, No. 89-00802 (S.D. Fla. April 17, 1990).

¹⁷⁶See the Kay case, in Judgment of Acquittal, U.S. v. Kay, 200 F.Supp.2d 681 (S.D. Tex., 2002).

the context of a tax assessment procedure¹⁷⁷.

The FCPA identifies payments, promises and, offers that are subject to criminal sanctions and on the basis of their suitability to procure economic or commercial activities and to maintain per se the corruption of the official's public function by the individual and/or the multinational. The Court of Appeal in the Kay case stated that: “(...) the text of the anti-corruption provision does not limit the criminal offense to payments aimed at obtaining government contracts only, but actually includes all those mediated or indirect results that have a positive influence on the ability of the agent, or the third party in whose interest the agent commits the crime, to obtain or maintain a business. In other words, the text approved by the Congress intended to prohibit not only the bribery of a foreign official aimed at obtaining or maintaining public contracts, but also all those payments which, directly or indirectly, help the briber to obtain or maintain a business (...)”. Reduction of tax burdens could ideally fall within the scope of application of the case. Similar payments, although they could not in themselves constitute illegal conduct, such as those aimed at acquiring a public contract, were nevertheless susceptible to the application of

¹⁷⁷See the Mattson case, in Memorandum and Order, SEC v. Mattson et al., No. 4:01-cv-03106 (S.D. Tex. Sept. 9, 2012).

sanctions penalties provided for by the FCPA, and precisely to the extent that they could produce a supportive effect on the economic and commercial purpose pursued¹⁷⁸.

The court's decision allows us to say that the positive influence on obtaining, maintaining the business will establish the conduct that is actually illegal under the FCPA and which falls outside the scope of the application of the provision. We can interpret that the court responded in a precise and logical manner to the need to protect the legal asset that underlies the regulation on international corruption, i.e. the need to prevent illicit behavior from causing an alteration to the allocation of economic resources and based on the principles of fair competition between companies on the market. Not all payments to foreign public officials are subject to criminal penalties under the FCPA. Thus, the case of payment behaviors that influence and are also suitable for influencing the continuation and entire process of business fall within the scope of application (Koehler, 2012)¹⁷⁹.

¹⁷⁸See the Kay case, in U.S. v. Kay, 359 F.3d 738 (5th Cir. 2004).

¹⁷⁹Koehler affirms that: “(...) the need for an interpretation of the FCPA adhering to the literal data, in the sense of excluding from the scope of application of the criminal case all those behaviors that are not suitable for influencing the correct conduct of business. In other words, according to the Author, it should be verified and ascertained whether the conduct could have a decisive influence on the achievement of the economic or

The violation of the FCPA and above all by a multinational also concerns orders and contracts with public bodies and foreign governments. This is a sector that is included in the scope of application of the FCPA once the power to assign a contract that exercises direct or indirect influence on international corruption is ascertained. We are talking about corruption committed in order to obtain oil contracts from a foreign company with public participation¹⁸⁰ and/or to obtain engineering, procurement and construction contracts from the government of a foreign state¹⁸¹ or an insurance contract linked to an organized project by a government¹⁸² and/or the sale of airplanes to a foreign country¹⁸³. Outside of public procurement there are payments in violation of the FCPA which are susceptible to the criminal liability of the multinational. The lines that are developed by the DoJ and SEC include payments that deal with criminal risks such as acts and to

commercial activity, the criminal relevance of conduct which does not present this characteristic having to be excluded (...)”.

¹⁸⁰See the case: Odebrecht/Braskem, op. cit.

¹⁸¹See the case: Bonny Island, op. cit.

¹⁸²See the case: Allianz SE, in In re, SEC Admin. Proceeding File No. 3-15132.

¹⁸³See the case: Airbus, in Information, U.S. v. Airbus SE, 1:20-cr-00021 (D.D.C. Jan 28, 2020); DPA, U.S. v. Airbus SE, 1:20-cr00021 (TFH) (D.D.C. Jan 31, 2020).

obtaining or maintaining a business through the following methods: “(...) -influencing the contractor's procurement process; -evade the rules concerning the importation of products; -evade any requirements such as licenses and permits, where necessary; -access confidential information on the public offering; -evade taxes or any sanctions; -influence the outcome of legal disputes or their actual execution; -obtain exemptions from legal obligations; -obtain tax benefits or customs duties; -avoid the interruption of a contract (...)”¹⁸⁴.

We are talking about operations that do not have direct access to the assignment of a public order to the multinational. They constitute conduct that concerns the award and which can alter the relevant competition. The suitability which is abstract to act as the facilitation in maintaining business from these types of payments are illegal and are certainly prohibited and violate the FCPA.

The American authorities many times dispute the violation of the FCPA since extraneous payments that have to do with public orders and contracts are the result and example for transactions that are connected to inspection operations by food or tax inspectors¹⁸⁵ influencing the procedures for registering products

¹⁸⁴See the case: Airbus, in Information, U.S. v. Airbus SE, 1:20-cr-00021 (D.D.C. Jan 28, 2020).

¹⁸⁵See the case: Tyson Foods, in Information, U.S. v. Tyson Foods Inc., No.

or regulating production levels¹⁸⁶ by obtaining permits and telecommunications frequencies¹⁸⁷.

Fraud as an object in the anti-corruption provisions in the text of the FCPA ends up with a very broad interpretation allowing American agencies to expand lawfulness in transactions that do not enter the intermediation sector and finalize public contracts. Due to the lack of judicial scrutiny regarding the correctness of the practice, it is also necessary to take note that the interpretation is in force in the American legislative text as a proposal that applies to the investigating authorities unless they resort to a district judge.

Thus we note an increase in the relative risk factors for the multinational which does not allow us to underestimate the

1:11-cr-00037 (D.D.C. Feb. 10, 2011). DPA, U.S. v. Tyson Foods Inc., No. 1:11-cr-00037 (D.D.C. Feb. 10, 2011). Complaint, SEC v. Tyson Foods Inc., No. No. 1:11-CV-00350 (D.D.C. Feb. 10, 2011). See the case: Alliance, in NPA, U.S. v. Alliance One International Inc. (Aug. 6, 2010).

¹⁸⁶See the case: Pfizer, in DPA, U.S. v. Pfizer H.C.P. Corp., (D.D.C. Aug. 7, 2012). See the case: ABInBev, in Final Judgment, U.S. v. Anheuser Busch In Bev et al., No. 1:13-cv-00127 (D.D.C. Oct. 24, 2013).

¹⁸⁷See the Kraft case, in Complaint, SEC v. Mondelēz International, Inc., No. 3-17759 (Jan. 6, 2017). See the case: Vimpelcom, in Information, U.S. v. VimpelCom Ltd., 1:16-cr-00137 (S.D.N.Y. Feb. 18, 2016). DPA, U.S. v. VimpelCom Ltd., 1:16-cr-00137 (S.D.N.Y. Feb. 22, 2016). Complaint, SEC v. VimpelCom Ltd. (S.D.N.Y. Feb., 2016).

indications coming from the Key ruling and the DoJ and SEC guidelines. The application of the FCPA is therefore of a broad practice and for this reason we see the need for exegesis and a broad interpretation of its legislative text (Tarun, Tomczak, 2018).

Jurisdiction and mode of action

The FCPA, the issuers, the domestic concerns and the others are three included categories that have to do with the offer, promise and, payment of bribes which are punished and committed: “(...) using the mail or any means or instrument of interstate commerce (...)”¹⁸⁸.

This is a double-sided forecast. Discipline forms the conduct that it pursues in a binding manner. Not every payment, promise, offer falls within the scope of application of the criminal case but those that occur the foreseen method and form an impact to one's disposition. The formula recalls the essential core of the conduct of the relevant provision that also formulates: “(...) to make it prohibited (...) to use the post or any means or instrument of interstate commerce, in a corrupt manner, to favor the offer, the

¹⁸⁸15 U.S.C. §§ 78dd-1(a) for the “issuers” 78dd-2(a) for the “domestic concerns” 78dd- 3(a) for the “others”.

payment, promise to pay, or authorization to pay a sum of money, an offering, a gift, a promise to give, or the authorization to give something of value to a foreign public official (...)"¹⁸⁹.

The formula defines the scope of application of anti-corruption provisions, the jurisdiction of the US authorities and, that of international corruption. The clause does not identify the jurisdiction of the US based on a territorial criterion only, thus also stating the authority of the agencies of the US that persecute facts of international corruption that have occurred in all or part of the territory of the US. The criterion used is certainly a matrix of a territorial nature which has a special character respecting the general territorial criterion and which refers to the conduct that is committed as: "(...) using the mail or any means or instrument of interstate commerce of the United States" and within American jurisdiction. The territorial connection with the US derives from the American jurisdiction on facts of international corruption and in accordance with the FCPA which is not connected to the conduct that identifies the giving, the promise and the offer even if there is a desire to identify the illicit use of instruments of communication and interstate exchange but also when it goes beyond the possibility of affirming the territorial location of

¹⁸⁹15 U.S.C. §§ 78dd-1(a) for the "issuers" 78dd-2(a) for the "domestic concerns". And with the relevant modification in par. 78dd-3(a) for the "others".

instruments that are part of American territory and also outside the territorial borders of the US, thus integrating conduct that is committed within the American jurisdiction.

This criterion of territoriality is capable and suitable to cause an expansion of American jurisdiction that also extends beyond the borders of the US since the communication and trade tools are current to a technological progress that supports materials in a restrictive way in the same country where the agent is part. More and more often, providers and servers appear to be located geographically in different countries (Rodrik, Subramanian, Trebbi, 2004) from those in which the communication or exchange service is actually used and, more rarely, international economic transactions which exclude the recourse to the internet and fully fall within the notions of tools where the FCPA derives the terms of awareness using tools with characteristics of the criminal case, aware of prosecutability and culpability (Deming, 2014a; Rose, Piefer, 2019)¹⁹⁰.

¹⁹⁰Deming affirms that: “(...) transnational economic agreements now occur constantly through the use of the internet and telecommunications tools which have, for the most part, connections with the US territory. This, in effect, creates a condition that risks extending US jurisdiction to all conduct committed through the use of modern technological devices connected to an Internet network, or through the use of FCPA territorial or extraterritorial facilities. It is good to start from the regulatory provision and its correct

Tools of communication, exchange and illicit use

Offering, promising and paying bribes punished or committed “(...) using the mail or any means or instruments of interstate commerce (...)”¹⁹¹. American jurisdiction depends on these entities. These are tools that correspond to instruments, apparatuses of interstate commerce (Sayed, 2004). The provision does not take a precise position on the meaning of these entities but merely defines the notion of interstate commerce. The overall meaning of the jurisdiction clause is derived in the sense that the activities of commerce, transportation or communication between the different American states or between one of the American states and a place or means of transport outside the state territory includes the use of the telephone or other means of communication and any interstate apparatus¹⁹².

With regards to interstate commerce we mean by way of example: “(...) -making a phone call; -send an e-mail; -send a telephone message; -send a fax; from, to or through the territory of the United States of America, as well as: - making a bank

interpretation, and then highlight the critical aspects (...)”.

¹⁹¹15 U.S.C. §§ 78dd-1(a) for the “issuers” 78dd-2(a) for the “domestic concerns” 78dd- 3(a) for the “others”.

¹⁹²15 U.S.C. §§ 78dd-2(h)(5) and 78dd-3(f)(5).

transfer; from or to a US bank account, or otherwise using the US banking system, or - traveling within the territorial borders of the country, or crossing them on entry or exit (...)” (DOJ, SEC, 2020; Kang, 2023).

The use of any means of communication or exchange facilitates the commission of bribery of foreign public officials which brings US jurisdiction subjected to the FCPA. The rule does not require in particular that the conduct take into consideration the interior of the American territory which is not so much the place of commission of the act but the way in which the commission determines the relative territorial connection according to the model of the FCPA which justifies the jurisdiction.

The two categories of subjects identified by the provisions of the FCPA, i.e. companies including foreign ones, have securities traded on the regulated market of the US, i.e. the issuers as well as legal persons who have their principal place of business in the American territory and/or who are incorporated under American law and natural persons who have nationality, citizenship or residence of the US, i.e. domestic concerns¹⁹³.

As a different rule, it is valid for subjects other than issuers and domestic concerns where the criterion results from a territorial

¹⁹³15 U.S.C. §§ 78dd-1(a) for the “issuers” and 78dd-2(a) for the “domestic concerns”.

connection which is not based on the methods of conduct but on the place where one resides.

(Follows): Conducts that are committed in the United States

The rule also applies to legal entities which states that it is prohibited: “(...) mail or any means or instrument of interstate commerce to commit bribery of a foreign public official (...)” for legal entities issuing securities in the American market and for natural or legal persons of American nationality.

The regulation is different in terms of jurisdiction and when it applies to natural and legal persons who do not include the previous categories of issuers, domestic concerns and of the other persons. Legal entities do not have a territorial connection with the US given the trading of securities on the American market, the birth, incorporation, residence and place of business of the US, as well as the criminal statute that prohibits conduct that covers the range of behaviors.

The first is superimposable therefore: “(...) it is forbidden to use the post or any means or instrument of interstate commerce (...)” to favor international corruption. The second is described by a residual formula, aimed at including within the scope of application of the case “any other act” committed with the same

purpose of favoring or committing international corruption of the foreign public official. For “other persons” the FCPA states that both conducts fall under US jurisdiction only where they are committed within the territory of the United States¹⁹⁴.

The provision attributes the method of commission of the act, i.e. the illicit use, the place in which the conduct is considered and the issuers of traded securities, natural and legal persons of American nationality as issuers, domestic concerns, illicit use of communication tools and exchange. This provision is independent of the place of commission of the crime by the agent. The “other persons” are not part of the two previous categories where the provision punishes a very broad area of conduct according to the territorial borders of the US. This provision was inserted in 1998 implementing the OECD Convention and based on the criminalization of international corruption behaviors that are committed within its territory. This is an inclusion of conduct that is committed outside the territorial borders of the US and by identified subjects.

¹⁹⁴15 U.S.C. § 78dd-3(a) for the “others”.

Conducts that are committed outside the United States

The FCPA was amended in 1998 regarding conduct that places and takes into consideration the subjects of an ideal connection for the US, i.e. the entities that are issuers of securities traded on a market that regulates American natural and legal persons.

The relevant amendment introduced yet another criterion to take into consideration for jurisdiction. We are talking about an alternative jurisdiction criterion to a territorial one of strict territoriality or territoriality in the broad sense. This is the principle of nationality where the subjects have an ideal connection to the US and are punished according to the conduct that is committed abroad and which does not fall within the American jurisdiction that applies according to the criterion of territoriality just mentioned¹⁹⁵. This is an alternative or auxiliary jurisdiction criterion that is equally prosecutable according to the FCPA and the conduct of the issuers of American law and the domestic concerns that are committed outside the US with the aim of following international corruption even if it is not committed through illicit use, with interstate communication and exchange tools. Subjects such as legal and natural persons are equipped with an ideal connection where the US persecutes acts

¹⁹⁵15 U.S.C. §§ 78dd-1(g) for the “issuers” 78dd-2(i) for the “domestic concerns”.

of international corruption that are carried out abroad and without the need for the conduct to have a connection with the territory of the country and the form it takes.

A criterion of jurisdiction that declines from the nation of the agent. It effectively extends the application of the FCPA beyond the borders of the US and is devoid of territorial connection with the country of origin. A criterion that shares the territorial matrix based on the methods of commission of the fact, the place of commission and the identity of the subject that results in the criteria for determining the jurisdiction that has to do with the territory.

Territorial v. Personal: criteria and nature of application of the FCPA in space

The criterion of jurisdiction has bases on national, American and foreign territory. The illicit use of communication and exchange tools, committed both in the American national territory and abroad by securities issuing bodies, i.e. natural and legal persons of American nationality, is punished. The illicit use of the same instruments, as well as any other corrupt act, committed at territorial borders in the US and by natural or legal persons who are not foreign issuers, is also punished. These are criteria for

attributing jurisdiction which are different and which lend different observations and criticisms.

In both cases, characteristics are assumed that are prominent according to the subjective identity of the agents where the exercise of power and the territorial connection of the crime is committed in American territory. The quality of the agents determines the prosecutability according to the rules of the FCPA of the conduct of others. Thus an observation is conducted that deals with the determination criteria in subjective jurisdiction. These types of criteria share a common core of objective and territorial origin emerging from the regulatory formulation according to the jurisdiction of the FCPA which declines from the subjects and which exercises its territorial location in a precise manner.

The first and second criteria are different from each other. The first is connected with the method of commission of the fact which has relevance in determining the jurisdiction of the US and in the second the relevance has to do with the location of commission of the conduct. In both cases the jurisdiction criteria respond to a territorial matrix. The commission of the conduct within the borders of the US determines the territorial connection of the crime with that of the legal system and the American jurisdiction is justified on an effective territorial criterion. The

commission of the crime according to the specific modality, i.e. the illicit and specific use of the communication and exchange tools when they have an American territorial location, determines the territorial connection of the crime with the American legal system which is less strong and respects the precedent which is always existing and justifies the jurisdiction of the US.

The prevailing relevance of the locality of commission of the conduct is a criterion that is connected with the territory, i.e. as a strong criterion of force and determination of jurisdiction. It appears to be different from the sub-territorial criterion and dictated for the issuers, the natural and legal persons of non-domestic concerns where the modality and location of the conduct creates a connection that justifies American jurisdiction. Both have a territorial basis according to the rule of the criterion which is only territorial and that the illicit use of interstate communication and exchange tools as well as other conduct that is committed to favor the path of corruption and in particular of foreign public officials falls within the American jurisdiction and which commits in the territory of the US what is not expressed under the sub-territorial criterion and based on conduct which is also prosecuted outside the American territory.

Therefore we can talk about two different criteria that imply the jurisdiction of the US over international corruption facts and

which go beyond the category of active subjects and who exercise the criteria for applying criminal law on a territorial basis. The FCPA requires that the conduct be committed within American territory, as an element that the punitive authority can intervene in the relevant state. An element that is not foreseen for the illicit use of communication tools. Interstate exchange also commits entities issuing securities traded in the US, by American natural and legal persons who are irrelevant for the conduct that falls within the US and its nature maintains the territorial connection with the American territory when the instruments are placed where the illicit use integrates the type of crime. A sub-territorial criterion of conduct that is prosecutable even where American borders are taken into consideration.

For the other persons, the facts of international corruption that are committed within American territory are prosecutable. According to the sub-territorial criterion, the issuers and the domestic concerns appear to be prosecutable for acts of international corruption which are committed inside and abroad of the US with the form of the FCPA through the illicit use of communication and of communication tools of interstate exchange.

After the modification of 1998, the anti-corruption provisions were amended to provide for the prosecutability of conduct that

is placed on American territory and on the basis of the territoriality criterion as provided for in the alternative or subsidiary jurisdiction criterion, with the facts of international corruption that are committed, now being prosecutable outside the territorial border of the US for the American natural persons, legal entities, subjects with a connection with the US and who are liable to prosecution for any act of international corruption that has been committed abroad.

This criterion comes out of the basis of the identity of the agent who connects the territorial fact that respects American territory, as well as the American natural and legal persons who respond to facts of any form or nature that have been committed abroad.

The exercise of jurisdiction after the FCPA of the 1998 contemplates two different criteria where the territoriality of the fact in the strict or in the broad sense and according to the nationality of the agent are distinguished in: “(...) -the criterion of main jurisdiction, on a territorial basis; -the alternative or subsidiary jurisdiction criterion, on a personal basis; on the basis of which, as we will see, actions which are not necessarily coincident and which are sometimes committed internally and sometimes externally to the territorial borders of the United States are prosecutable under the FCPA (...)”.

Transnational elements of the international corruption case are

highlighted. Extraneousness respects the American legal system to look closely at the conduct that persecutes the identity of the perpetrators of the crime. In relation to the conduct, the illicit use of interstate communication and exchange tools appears to be prosecutable, as is the identity of the perpetrators of the de facto crime.

With regards to conduct, the illicit use of interstate communication and exchange tools is also prosecutable outside the territorial borders of the US. Some subjects can also be prosecuted outside the territorial borders of the US. In relation to subjective foreignness, it is observed that non-American agents are subject to certain conditions for conduct that is committed outside the territorial borders of the US. Regarding subjective foreignness, it is observed that non-American agents are prosecutable under conditions of conduct that is committed within, outside the territorial borders of the US. The two elements of foreignness are connected according to the prosecutability of foreign legal entities, issuing securities in the American market, for the facts of illicit use of communication and interstate exchange tools that are committed outside American territory.

The extraterritorial application that will be analyzed in the following paragraphs is included both as a principle of

jurisdiction criterion and as an alternative jurisdiction criterion. The criterion for determining jurisdiction refers to the identity of the subjects. By identifying the facts that, through reference to the subjects, describe conduct that is prosecutable and connected with the specific, broad territory and also abroad (Vollebregt, 2010).

This criterion of jurisdiction is a criterion that is based on a personal basis making the conduct that is committed at the territorial borders of the US prosecutable where some agents who have a strong connection with the American legal system are taken into consideration. Thus jurisdiction is determined by referring to categories of subjects that are expressly identified and which does not establish the prosecutability of facts that are committed and which are contrary to prosecutability committed outside the territorial borders of the US.

This is a criterion that determines jurisdiction on a territorial basis, of a subjective nature when the area where the American authorities exercise their jurisdiction is identified. It is stated that the FCPA contains several criteria to determine the jurisdiction of the American authorities for international bribery committed inside, outside the US and on a territorial basis. These are the following three criteria: “-the criterion of factual territoriality, according to which the jurisdiction of the United States is

affirmed on the basis of the characteristics of the fact; -the criterion of modal territoriality, according to which the jurisdiction of the United States is affirmed on the basis of the characteristics of the form of the conduct; -the criterion of universal territoriality, according to which the jurisdiction of the United States is affirmed on the basis of the characteristics of the acting subject (...)" (Kang, 2023).

A jurisdiction based on a main criterion of jurisdiction which includes the criterion of factual territoriality and the criterion of modal territoriality based on the alternative jurisdiction criterion which is constituted by the criterion of global territoriality and of a territorial nature.

FCPA: Extraterritorial enforcement

The criterion of main jurisdiction has an objective nature and is pursued according to the rule of the FCPA for international corruption events that have a territorial connection that respects the territoriality of the event and the form of the conduct. The criterion that constitutes the alternative or auxiliary jurisdiction has a subjective nature which makes corruption cases which have a weak territorial connection with the US and which refer only to the identity of the agent as prosecutable according to the FCPA.

Both the main and alternative jurisdiction criteria constitute criteria for the application of criminal law in space of a territorial nature and which lead to the extraterritorial application of the FCPA. Extraterritoriality is proportional to the connection of the fact in the American legal system which is high and the territorial link of the fact with the American territory is less strong.

The analysis of the negotiation resolution tools in international corruption cases reflects the American agencies that have agreed on the objective and suspension of ongoing civil and criminal proceedings for international corruption cases involving foreign multinationals. The FCPA defines the scope of jurisdiction which is not necessarily limited to the national borders of the US. For some categories we can say that these are subjects that are part of global territoriality. The structure of the FCPA expands the territorial jurisdiction of the US over international corruption matters. With respect to foreign subjects, the FCPA requires a connection of the fact with the territory of the US and which in some cases is absent and the characteristics of the jurisdiction are extended to American provisions and national borders (Koehler, 2014a).

The examples of extraterritoriality of the application of the FCPA are the foreign multinational. In this spirit we recall the Statoil case. A foreign multinational Norwegian oil company that in

2006 found itself indicted for foreign bribery in the US. The only connection with the US was the money transfer by bank transfer which was carried out from a current account opened at a credit institution in New York to a Swiss account. The corruption involved a series of deals by Iran's state-owned oil company that netted the Norwegian multinational millions of dollars in profits. The corruption did not concern the American dimension as the corrupter was Norwegian and the corrupt Iranian and the bribe was sent from a New York account intended for offshore intermediaries, Iranian public officials. Statoil issued securities traded on the American market and were subject to registration under the Securities Exchange Act (1934). The multinational covered the qualification of the issuer and its international corruption conduct was outside the territorial borders of the US which was prosecutable according to the FCPA (White, 2014)¹⁹⁶. The extraterritorial application of the FCPA has been recorded as we have seen in the Bonny Island case where multinational companies all over the world such as the French Technip, the Japanese JGC and the Italians Snamprogetti, Saipem and ENI have concluded agreements with the authorities which involved the payment of civil and criminal penalties exceeding one billion

¹⁹⁶The Statoil case, in Information, U.S. v. Statoil ASA, No. 06-cr-960, S.D.N.Y. Oct. 13, 2006; DPA, U.S. v. Statoil ASA, No. 06-cr-960, S.D.N.Y. Oct. 13, 2006; In re, SEC v. Statoil ASA, No. 3-cv-12453, Oct 13, 2006.

dollars and for the dismissal of the proceedings had as its object the accusation of having paid over 190 million dollars to conclude the proceedings as well as other collateral accusations. In particular, Technip and ENI had securities traded on the American market and punishable as issuers even if the territorial connection of the conduct with the US was weak and consisted of carrying out transfers from current accounts only located in New York which sent emails and faxes in US¹⁹⁷.

Another fairly well-known case is the Total of 2013 where the French multinational which was active in the oil sector accepted sanctions of around 400 million dollars from the American authorities and obtained the dismissal of the proceedings for international corruption of Iranian officials who were paid to allow, obtain enormous exploitation of oil and gas deposits in their country. The connection with the territory also in this case with the US was weak given that the transfer of the 500,000 dollars from a bank account in New York, as a not huge amount which represented 1% of the bribes that are paid to the Iranian authorities¹⁹⁸.

In the 2020 ENI-Saipem case, an Italian six-legged dog company

¹⁹⁷See the Bonny Island case, op. cit.

¹⁹⁸See the Total case, in Information, U.S. v. Total, S.A., No. 13-CR-239, E.D.V. May 29, 2013; DPA, U.S. v. Total, S.A., No. 13- CR-239, E.D.V. 29 May 2013; In re, SEC v. Total, S.A., No. 69654, 29 May 2013.

that agreed to pay 20 million dollars to the SEC to achieve the related dismissal of the civil proceeding given that it did not follow the Saipem investee and to create and maintain sufficient internal controls, thus preventing the stipulation of contracts with intermediaries who are devoid of any economic logic, thus favoring orders in Algeria. The issue of securities traded on the American market. ENI, as a foreign company was as an issuer, i.e. subject to the provisions of the FCPA regarding corruption which regulates specific and related obligations of correct keeping of accounting records¹⁹⁹.

Some subjects are subjected to the rules and jurisdiction of the US even outside the territorial borders of the country. American corruption is more lenient with American legal entities and individuals and less with foreign ones. In the American territory, natural and legal persons who are not issuers as well as legal issuers of American nationality are criminally charged for the illicit use of communication tools and interstate exchanges and for any other act that is different from any form of conduct.

Non-issuing natural and legal persons of non-American nationality may not be held accountable for any act other than the illicit use of interstate communications and exchange facilities.

¹⁹⁹See the ENI-Saipem case, Order, SEC v. ENI S.p.A., No. 88677, April 17, 2020.

This is a criminal policy choice which cannot be shared but seems to place people, foreign non-issuing companies and local ones on different levels.

In finis it is understood that the criteria of jurisdiction, main and auxiliary have a territorial nature and that they lead to an extraterritorial application of the FCPA.

(Follows): The legal bases of extraterritoriality

As we understood from the previous paragraphs, the FCPA has established three specific criteria for American jurisdiction, all based on: factual, modal and global territory. Factual and modal territoriality lay the foundation for primary jurisdiction. Instead, global territoriality sets the criterion of auxiliary jurisdiction.

All these criteria, especially the main and auxiliary criterion, lay the foundation for the extraterritorial application of the FCPA. The American discipline subjects to the jurisdiction of origin but also to the foreign one. The American entity is sanctioned and operates illegally and outside the borders of the US. This trend of expansion of American jurisdiction is also justified due to the lack of international protection cooperation in this sector and especially from foreign countries (Deming, 2014a).

The form of extraterritoriality of the FCPA protects the national

borders of the US to repress international corrupt conduct that has a minimal territorial connection in American territory. The US proposes an international inquisitor of the corrupt conduct of foreign public officials when they are practiced and in the guise of a multinational (Osofsky, 2007). The jurisdiction criteria allow for a large part of international corruption phenomena, thus providing American agencies with the legal basis to prosecute these types of facts (Leigh, 2006; Smith, Parling, 2012; Willborn, 2013; Koehler, 2014b; Leibold, 2015; Lèna, Royer, 2018).

However, this type of extraterritorial jurisdiction is not without its critical issues. The question arises on what political and legal basis it is based. Extraterritorial enforcement outside the territory of the FCPA is scarce and absent in the fight against corruption. This is a political criticism of American economic intervention in foreign countries and the adoption of the law is important due to the concern of a political and institutional rift with foreign countries (Koehler, 2014a).

This approach has found a legal basis in the American legal system which is compared with the presumption against extraterritoriality and based on American law which finds application outside the territorial borders of the US also seen as overcoming the conflict with foreign legal systems, i.e. as a possible short circuit with the American system itself (Dodge,

1998; Knox, 2010; Knox, 2011; Dodge, 2011; Walsh, 2012-2013; Clopton, 2014; Herz-Roiphe, 2014; Dodge, 2020)²⁰⁰.

American constitutional law and international law admit that US legislation has extraterritorial application (Williams, 2008). American Constitution where in art. 1 states that: “(...) explicitly gives the federal government the power to issue acts susceptible to extraterritorial application, in some areas and according to certain given purposes (e.g. acts of piracy) where necessary, in particular, to guarantee compliance of US regulations (...)”²⁰¹. A position that has seen over time a weakening of the principle of territoriality in favor of consensus on the extraterritorial application of domestic law where it is in conflict with international law norms that prohibit it (Dodge, 2020)²⁰².

²⁰⁰See the Morrison case, in *Morrison v. National Australia Bank*, 130 U.S. Ct. 2869, 2010.

²⁰¹U.S. Const., Art. 1, § 8, co. 3, 10, 18.

²⁰²Dodge affirms that: “(...) the long journey of the presumption against the extraterritorial application of domestic law, observing that the nineteenth-century rule of *Charming Betsy*, according to which legislative prescriptions had to be applied in such a way as not to conflict with foreign systems, will soon give way to an opposite principle for where legislating in an extraterritorial sense is permitted where not prohibited by an express rule of international law, thus admitting much less stringent interpretations of the same rule which look at the effects of the conduct rather than its locality (...)”.

The constitutional and international law prerequisites for extraterritorial application do not exclude the lines of principle. The extraterritorial application of the FCPA, in order not to impede the constitutional and international order, it is necessary to verify that there is no conflict with the presumption against extraterritoriality of an American nature and so we must think and follow our investigation.

The extraterritorial application of American law has been recognized by the Supreme Court in rulings of different tenors which have consolidated the legitimacy and constitutional foundation²⁰³. The presumption against the extraterritorial application of American law (presumption against extraterritoriality) affirmed its geographical limitation within the territorial borders of the US according to the assumption based on the qualification of a fact that is compliant and not with the law and with regard to the place where this fact occurs and is taken into consideration²⁰⁴. The Supreme Court has recognized the extraterritorial application of American law as legitimate and

²⁰³See, *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234-35 (1804). In *Schooner Exch. v. McFaddon* case, 11 U.S. (7 Cranch) 116, the Supreme Court states: “(...) that extraterritorial application can derive exclusively from a legal presumption (...)”.

²⁰⁴See the opinion of the judge Holmes in *Banana* case, in U.S. S. Ct. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

has ensured that the practice maintains a foundation of rationality and legal justification. It is a position that is manipulated by non-agreeable approaches and with the effect of denying and extending the jurisdiction of the American authorities on individual cases which are subjected to the evaluative control of the judge²⁰⁵ and uniform interpretation of the law which tends to guarantee where the stability of the law is possible (Shapiro, 1992). As can be understood from the sentences of the Supreme Court, the presumption of the extraterritoriality starts from a rigid and stringent conception to an elastic, coherent notion that compares the alleged legitimacy of the extraterritorial application of the FCPA (Dodge, 2020).

Extraterritoriality dates back to the 19th century as can be seen in the rule of the *Charming Betsy* where the legislation approved by Congress did not interpret the rules of international law in a conflicting manner²⁰⁶ and which had to be applied only to people where the legislator had the jurisdictional authority, i.e. within

²⁰⁵See the case: *Aramco, U.S. S. Ct. EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991). The Supreme Court: “(...) denied that US workplace discrimination law could apply to the conduct of an American company against an American citizen, but committed abroad (...)”.

²⁰⁶*U.S. S. Ct. Murray v. The Charming Betsey*, 6 U.S. 2 Cranch 64 64 (1804).

territorial borders²⁰⁷. The principle of territoriality weakens since the Permanent Court of International Justice affirmed that human behaviors could be the subject of normative prescriptions based on the locality of the effects and on the provisions of international law to the countries that are legitimated to legislate extraterritorially²⁰⁸.

The Supreme Court of the US in the Banana case of 1909 decided to apply the Sherman Act of 1890 to the anti-competitive conduct of an American company located abroad. The Court abandoned the presumption against the notion of extraterritoriality which was recognized on new arguments which admit the possibility that American law could find extraterritorial application by deciding to underline the context of the legislation of the US as mainly territorial character where the doubt preferred it interpreted and produced the territorial borders and the American legislator exercised and legitimized its political and economic power²⁰⁹. According to judge Holmes “(...) the legality or illegality of a behavior should always be determined on the

²⁰⁷Expression used by judge Story in U.S. S. Ct. *The Appollon*, 22 U.S. 9 Wheat. 362 362 (1824).

²⁰⁸PCIJ, S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), § 19-23.

²⁰⁹See the Banana case, in U.S. S. Ct. *American Banana Co. v. United Fruit Co.*, op. cit.

basis of the law of the country in which the conduct is carried out, since otherwise there would be a risk of negatively interfering in relationships of international relations between states (“comity of nations”) (...)”²¹⁰.

In the *Foley* case of 1949 the Supreme Court reiterates that Congress acts on the national situation where the locality of the conduct as the focal point treats the territorial borders of the US in American jurisprudence unless another path is found in Congress that overcomes this presumption²¹¹. The interpretative line in the *Banana* and *Foley* cases from the Supreme court are inadequate to deal with the conduct that is produced within the US. The previous line was abandoned, ignored and disapplied with the tool of distinguishing (Eskridge, 1998) until the the Supreme Court was not called upon to rule on a dismissal due to discrimination which occurred abroad in the *Aramco* judgment of 1991 where the principle was reaffirmed. In particular, judge Rehnquist stated that: “(...) considered the approach used in the *Banana* and *Foley* sentences valid, in the case of an intent not clearly expressed on the part of Congress, for which it was necessary to avoid damaging international relations and keep in mind that the Congress legislates first of all to regulate the

²¹⁰See the opinion of judge Holmes in *American Banana Co. v. United Fruit Co.* case, op. cit.

²¹¹U.S. S. Ct. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949).

national situation²¹² it significantly strengthened and rigidified the presumption against extraterritoriality, transforming it from an interpretative canon to a real express rule, a circumstance which was not free from criticism²¹³, and furthermore it consolidated the principle, which regained force in application of the law (Kramer, 1991) (...) focusing the judgment on the locality of the conduct (...)”²¹⁴.

An interpretative approach that was modified in the Morrison ruling of 2010 and which definitively abandoned the established principles of the Supreme Court and strengthened the Aramco ruling by confirming that the principle against extraterritoriality is not an express rule where the judgment is not based on the locality of the conduct committed. The court ruled that the law did not indicate an intention to have extraterritorial application which in reality it did not have. This is an extraterritorial application that is noted only in the case where the legislation states the aspects that are relevant and regulated in American law that have occurred abroad, going beyond the Aramco case which was based on the conduct that paved the way for provisions that

²¹²See the case: Aramco, U.S. S. Ct. EEOC v. Arabian American Oil Co., (1991), op. cit.

²¹³See the dissenting opinion of judge Marshall.

²¹⁴U.S. S. Ct. Pasquantino v. United States, 544 U.S. 349 (2005); U.S. S. Ct. Small v. United States, 544 U.S. 385 (2005).

are without geographical limitation²¹⁵.

A “new” approach based on the aspects that are relevant in the regulated questions of law and which affirms the subsequent Nabisco ruling of 2016 where the court underlined that the presumption was overcome by indications that are based on rules of the legislator without an express regulatory indication²¹⁶.

The extraterritoriality in the Morrison and Nabisco cases is milder, more flexible but also more structured. It thus allows us to take into consideration that the objective of the regulatory provision is based on the conduct that is connected with the territorial borders of the US, thus excluding the use of extraterritoriality of American law and the limit of the presumption against extraterritoriality (Dodge, 2020).

The principle established in these cases as well as in the following WesternGeco case of 2018 regarding loss of profits abroad due to patent infringement. The supreme court stated that: “(...) the infringement occurred within the borders of the United States, since the violation is the real focus of the law subject to review, it excluded that it was an extraterritorial application of the regulatory provision, and with it it excluded the presumption against extraterritoriality in deciding on loss of

²¹⁵See the Morrison case, in Morrison v. National Australia Bank, op. cit.

²¹⁶See the Nabisco case, in U.S. S.Ct. RJR Nabisco, Inc. v. European Community 136 U.S. 2090 (2016).

profits occurring abroad (...)”²¹⁷.

From the Morrison case and after, two main pillars are present: the lack of indications where the American legislation does not apply outside the territorial borders of the US and the fact that involves an extraterritorial application which determines in an individual and abstract way the focus on a regulation that verifies the portion of the fact that constitutes the basis of American law, i.e. the focus test (Williams, 2014). The functioning of the presumption against extraterritoriality is compared with the practice of the FCPA, highlighting that the extraterritorial application is a starting point where the presumption is applied in relation to criminal law and to FCPA.

This is a topic that is subject of a ruling by the Supreme Court which reconstructs the terms of the question to reach a conclusion. The investigation starts from the historic US v. Bawman case of 1902 where the supreme court ruled that: “(...) the presumption against the extraterritorial application of US law had (or could have) a different relevance and regulation with regard to criminal provisions, stating in particular that the institution could not find application with respect to some categories of crimes, even in the absence of an explicit indication

²¹⁷U.S. S. Ct. WesternGeco LLC v. ION Geophysical Corp., 138 U.S. 2129 (2018).

in the legislative provision (...) ²¹⁸. The relevant section of the penal code did not contain a specific regulation aimed at limiting the geographical application of the incriminating cases, nor indeed did it contain contrary indications in the sense of allowing or endorsing an extraterritorial application (...). The repression of some crimes, such as those committed through fraud, the commission of which is not strictly connected to the presence of the agent in the United States, risked being debased by a strictly territorial application of criminal law, based on the localization of the conduct. In the presence of particular types of crimes, in which the damage to the protected legal good could occur either from conduct physically committed in the US as far as abroad, the presumption against the extraterritorial application of US law had to be considered outdated and not applicable, allowing the consequent extraterritorial application of criminal law (...)” (Dodge, 2020).

This is a ruling that is preceded by the principle of extraterritoriality and as it was established in the Morrison case about a century ago. There can be no doubt that they continue to be in force and that they are part of a binding precedent that finds its basis in the application of the presumption in matters of criminal laws (Rotman, 2015). The two sentences are

²¹⁸U.S. v. Bowman, 260 U.S. 94 (1922).

reconcilable and contradict each other and the presumption against extraterritoriality in criminal matters is different and respects civil or administrative matters (Clopton, 2014). The Morrison case does not exclude the validity of the principles of the Bawman ruling. It precisely states a principle that has been reported as conflicting with it. In the Bawman case the Supreme Court noted an absence of indications that are contrary to the extraterritorial application of criminal law (*ubi lex voluit, dixit...*) and in the Morrison case the court established: “(...) that if the law of any discipline does not contains indications of extraterritorial application, the same applies only with regard to events that occurred in the United States (“...ubi noluit, tacuit”) (...)”.

These are points that are different²¹⁹. The Bawman ruling has nothing to do with criminal law. On the contrary, the decision that was pronounced is the same with that which was decided by the supreme court already in 1922 where the silence of the law did not hinder the overcoming of the presumption against extraterritoriality in the categories that are crimes committed against the government federal and where the same operates in the general declination and tradition of incriminating cases²²⁰.

²¹⁹U.S. v. Bowman, op. cit., p. 98; Morrison v. Nation Australia Bank, op. cit., p. 2878.

²²⁰U.S. v. Bowman, op. cit., p. 98.

The Bowman case distinguishes the incriminating cases to protect the right of the federal government from fraud and obstruction against common crimes, i.e. crimes against public safety against the person and against property such as theft, robbery, murder, arson, embezzlement, frauds in general which affect the peace and order of the community of associates. The Bowman case belongs to the special category of crimes against the federal government and which falls under ad hoc discipline in the absence of indications where the text is part of the extraterritorial application, especially of conduct committed abroad and by American citizens. Common crimes that respond to the presumption against the extraterritorial application of the American regulatory text where the silence of the law deems that the same does not apply to facts with no territorial connection with the US²²¹.

The topic is controversial following the rulings reported in the Morrison case. Some federal appeals courts are exposed to doubts about the permanence of the presumption against extraterritoriality in cases involving criminal laws²²² in response to the new decision.

In the Vilar case, the Second Circuit Court of Appeals did not

²²¹U.S. v. Bowman, op. cit., p. 98-99.

²²²U.S. v. Siddiqui, 699 F. 3d 690, 700 (2d Cir. 2012); see also: U.S. v. Leija-Sanchez, 820 F.3d 899, 901 (7th Cir. 2016).

accept the government's thesis regarding the presumption that it cannot be applied in the criminal context, reaffirming however the principle of Congress and legislating and regulating the behavior of members in the national context²²³.

The extraterritorial application of criminal law applies except for the categories of crimes identified with the Bowman case and to all other incriminating cases that fall within those contained in the FCPA. The case was structured according to the interests that protect and exclude the FCPA as qualified in the text of the law that protects the federal government dealing with criminal provisions protecting competition and competition of companies in the market as can be seen from the preparatory works (Koehler, 2014b). It is not excluded that the presumption against extraterritoriality applies by stating that the FCPA does not take a position as other American laws provide for provisions of a criminal nature.

The Morrison case allows us to verify the presumption of the precise indications that come from the text where the preparatory works attest the will of the legislator and identify the focus on the legislative provisions to ascertain the concrete conduct of the effectively extraterritorial judge as a focus test.

The FCPA is susceptible to extraterritorial application. The text

²²³U.S. v. Vilar, 729 F. 3d 62, (2d Cir. 2013).

identifies that the conduct sanctions the use of a specific method of action, thus punishing the criminal sanction of the illicit use of communication tools and interstate exchange. The reference to this method does not give rise to the commission of the act where the provision is susceptible and abstract to extraterritorial application and applicable to acts committed with this type of method by subjects and to acts committed with such methods by subordinates subjects, i.e. legal entities issuing securities on the American market (issuers), American natural and legal entities (domestic concerns)²²⁴. The FCPA punishes the illicit use of communication tools and interstate exchange of any fact or act committed within the territorial borders of the US by subjects other than those indicated, i.e. issuers of securities and American natural and legal persons. The FCPA excludes that the text finds extraterritorial application by specifying the conduct that was committed within the territory of the US. Provision that is not susceptible to extraterritorial application and by regulatory provision²²⁵.

The FCPA punishes a conduct carried out abroad by American individuals and entities as well as American entities issuing

²²⁴15 U.S.C. §§ 78dd-1(a) for the “issuers”; 78dd-2(a) for the “domestic concerns”.

²²⁵15 U.S.C. §§ 78dd-1(a) for the “issuers”; 78dd-2(a) for the “domestic concerns”; 78dd-3(a) for the “others”.

securities on the American market. This is a provision that attributes to the text of the law an extraterritorial application of the criminal provisions by identifying the place of commission of the crime in a single foreign territory and not within the borders of the US. The provision is abstract and susceptible to application only extraterritorially²²⁶. However, the structure of the criminal provisions shows that the intentions of the legislator in the text of the law, i.e. the FCPA, is not designed to have extraterritorial application.

Since the conduct is not typified by reference to specific forms such as the illicit use of interstate communication and exchange tools, Congress has excluded extraterritorial application, avoiding that the conduct committed outside the US may not be syndicated by the American judge and lacks the authority to judge exogenous behavior.

The specific incriminating case which is reserved for people who are different from issuers and domestic concerns cannot be linked with the consent of the extraterritorial application of the provisions which this specification is absent and has to do with the terms of *ubi lex noluit, dixit*. The principles expressed in the Morrison case require extraterritorial application which is clear

²²⁶15 U.S.C. §§ 78dd-1(g) for the “issuers” of American law; 78dd-2(i) for the “domestic concerns”.

and precise from indications to this effect. Based on this consideration it expresses the prosecutability of behaviors adopted at the territorial borders of the US. Thus this point of view reinvigorates the legislative text which is not susceptible to extraterritorial application.

In the same line of thought with the FCPA the alternative principle of jurisdiction leads to the *latu sensu* application of an extraterritorial nature of the criminal provisions for natural and legal persons, including issuers of securities under American law. The provision allows the prosecution of acts of international corruption which are committed abroad by subjects who do not introduce an incriminating case which is susceptible to both territorial and extraterritorial application and also auxiliary to the domestic one and identified in the exclusively foreign area where the US claims exercise its criminal jurisdiction according to the nationality relationship with the agent.

We cannot talk about the extraterritorial application of a criminal law but about the exercise of criminal jurisdiction in one's own foreign territory. It is noted that the provision of an alternative criterion of jurisdiction introduces the prosecution in foreign territory of typical conduct, committed by subjects who determine that the US is connected with the nationality relationship and which strengthens the conclusion with the

general provisions that are susceptible to extraterritorial application. The Congress wanted to give to the extraterritorial application of the FCPA a precise indication of the text of the incriminating case which does not resort to the introduction of an alternative criterion of jurisdiction than prosecuting the facts committed abroad and not to the extraterritorial application of a general provision.

It can be concluded that the extraterritoriality issue with the FCPA is problematic with regards to the application of anti-corruption provisions to foreign legal entities that are issuers of securities in the American market not occurring within the territorial borders with the US. The FCPA follows the illicit use of instruments of exchange and commerce that have an interstate nature by placing both American and foreign issuers therefore that many multinationals have fallen into the hands of justice by trading securities on the American market holding the qualification of the issuer in accordance with the FCPA for pipelines that have minimal or no territorial connection with American territory²²⁷.

The anti-corruption policy provides for the prosecution of facts that are identified through the form of the conduct and the illicit

²²⁷See the case: Total, in Information, U.S. v. Total, S.A., op. cit.; DPA, U.S. v. Total, S.A., op. cit.; In re, SEC v. Total, S.A., op. cit.

use of instruments of trade and exchange that can be committed while the agent is abroad of American territory and is unaware of his conduct which connects with American territory and which is abstractly susceptible to extraterritorial application²²⁸.

The case does not expressly include the prosecution of facts that have to do with the internal borders of the US and which refer to forms of conduct that ignore the physical location of the agent in an American territory which do not consider the presumption against the extraterritorial application of American law. The text of the law does not contain indications in this sense, highlighting contrary which aim to protect the relative application of the criminal provisions to facts committed in American territory.

In the Morrison case we can say that the FCPA is not necessarily capable of applying in an extraterritorial manner criminal provisions that are contained to sanction the conduct that falls within the territorial borders of the US (Koehler, 2014a). As a consequence, foreign multinationals that issue securities in the American market are qualified as issuers and do not prosecute federal agencies for violations of anti-corruption provisions that are committed abroad.

The connection with prosecution depends on the identification of the place where the violation is determined through a focus test

²²⁸15 U.S.C. §§ 78dd-1(a) for the “issuers”.

as described in the Morrison case and in accordance with the law which identifies the focus of a regulatory provision that ascertains the violation that occurs within American borders.

In particular, the relevant incriminating case prohibits: “(...) the use of the mail or any means or instrument of interstate commerce, in a corrupt manner, to facilitate the offer, payment, promise to pay, or authorization to payment of a sum of money, an offer, a gift, a promise to give, or authorization to give something of value to a foreign public official for the purpose of receiving help in obtaining or retaining business, for or with someone, or direct them towards someone (...)”²²⁹.

The illicit use of interconnection tools has facilitated the processing of corruption which clears the way for the implementation of the use of financial services to move the sums of money that are intended for the foreign public official and the exchange of communications via email to coordinate the operations of a corruption scheme²³⁰.

²²⁹15 U.S.C. §§ 78dd-1(a)(1) last period, 78dd-1(a)(2) u.p., 78dd-1(a)(3) u.p., for the “issuers” 78dd-2(a)(1) u.p., 78dd-2(a)(2) u.p., 78dd-2(a)(3) u.p. for the “domestic concerns” 78dd-3(a)(1) u.p., 78dd-3(a)(2) u.p., 78dd-3(a)(3) u.p. for the “others”.

²³⁰See the Straub case, in Mem. and Order, SEC v. Straub, op. cit.; See the Siemens case, in SEC v. Steffen, No. 11-Civ-9073 (S.D.N.Y. 2013 Feb. 19, 2013).

On the other hand, the evolution of technology has caused the transposition of economic, financial and communication services to the material supports of digital platforms that are offered by operators that have various servers that are located to the US. The use of the digital tool has these characteristics. Such a tool also involving the transit in the American territory of information as communicative or financial content which respects the transfer via bank transfer, thus integrating the territorial connection which is necessary for the affirmation of the jurisdiction of the American agencies for assert the jurisdiction of American agencies over international corrupt conduct (Deming, 2014a). The devices used in the corruption scheme operate via a connection with the internet where the network is an interconnection tool that seems to fall within the notion of an instrument of interstate commerce for the illicit use of the prosecutability of the conduct.

The location of the conduct takes on a secondary element of evaluation which is connected with the American territory and is ensured by the instruments through the conduct that is taken into consideration. In the Straub case, the judge noted that American jurisdiction affirmed on the basis that some emails were linked to the corruption scheme and passed through American territory²³¹.

²³¹See the case: Straub, in Mem. and Order, SEC v. Straub, op. cit.

The form of the conduct determines the territorial connection and also the place that is taken into consideration. We can also give a certain interpretation in the conflict with the presumption against extraterritoriality that we see in the Morrison case. The FCPA prevented the agent from using instruments of commerce, i.e. interstate exchange to facilitate and commit bribery of a foreign public official. The text prevents the transit of information for purposes that are illicit where the violation of the ban is committed within American territory. The focus of the relevant provision is the use of interstate communication and of commerce systems for illicit purposes as a use that normally occurs internally and externally within the territorial borders of the US. The FCPA does not contain indications that allow its extraterritorial application except that the illicit use of these tools occurred at American borders and fallen within American jurisdiction.

The absence of clear indications in the FCPA system does not allow extraterritorial application. The violation of anti-corruption provisions occurs within national borders to fall under American jurisdiction. Thus, within the scope of application of the FCPA, it is excluded that the conduct of foreign multinationals abroad does not have a significant territorial connection with the American country.

The FCPA adheres to the provision that appears illegitimate for the jurisdiction since it is not sufficient the price of bribery to be transferred to the recipient from a checking account that is established at the Bank of the New York or to a foreign employee in the foreign headquarters of a foreign multinational enterprise who sends an email using a digital service with the server of the US. The illicit use of this type of interstate communication and exchange tools operating in the foreign issuer of traded securities (issuer) occurs in this way within the American territory which is contrary to the jurisdiction of the US when the corruption scheme affects the country incidentally and negligibly.

A literal interpretation of the text of the congress appears to be based on the will of the legislator and is also consistent with the provisions of the Supreme Court decision as we saw in the Morrison case. However, it does not seem susceptible to refutation with arguments that are equally solid and without the intervention of the Supreme Court which distinguishes the FCPA from the general rules that are included in the Morrison case and are linked to the text of the anti-corruption law and the assumptions that are part of the sentence Bowman. It is an approach that highlights possible operational critical issues and poses questions that are not easy to resolve.

An interpretation of the provisions on jurisdiction that leads to

the weakening of a level of enforcement. In recent years, passing from the American anti-corruption law, the paths of a system that proves capable of capturing the international corruption of a multinational, are redefined even if it have a supranational dimension and assuming the same law. It should be noted that the application of the rules does not ignore the consequences that cannot alter and convey the content predetermined by the law itself as well as any unreasonable and overall consequences that are inadequate and which are resolved with remedies other than interpretation.

The Congress provides for the prosecution of international corruption conduct by foreign multinationals abroad, overcoming the presumption of extraterritoriality in institutional conflicts that this provision entails in the illegitimate practice promoted by federal agencies (Koehler, 2016)²³².

It is useless to ask why foreign multinationals do not contest the application practice and do not agree to sign extra-trial agreements avoiding a favorable judicial path for the

²³²Coons, Examining enforcement of the Foreign Corrupt Practices Act, Hearing before the Subcommittee on Crime and Drugs of the Committee on the Judiciary, senate (Nov. 30, 2010): <https://www.govinfo.gov/content/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf>

extraterritorial application of the FCPA (Koehler, 2014b)²³³.

We cannot give, moreover, an answer only by claiming that the persuasive force of American agencies and the legal path at their disposal make American anti-corruption provisions equipped with an extraordinary level of enforcement. In the negotiated resolution tools in cases of international corruption, the facilitations entail agreements that lead to the refusal of cooperation with the relevant federal authorities.

²³³Koehler affirms that: “(...) the main reason why the multinational enterprise does not contest the absence of jurisdiction in the context of the FCPA must be attributed to the probability that this position could be characterized as a refusal to cooperate with the federal agency, from which derives not only the possibility of a more rapid and rapid indictment and to be defined as non-cooperative, but also the tightening of sanctions that derives precisely from the refusal to cooperate. In other words, at the mere mention of exceptions, even if well founded, the multinational enterprise risks losing the possibility of negotiating an agreement with reduced sanctions and milder effects on the image and finances of the corporation. As we will see later, faced with this mechanism that rewards collaboration and discourages litigation, the company seems to have no alternatives to the proposal of an agreement (...)”.

Exceptions for routine governmental actions

In the FCPA system of paragraph b) of the anti-corruption provisions it is provided that the same do not apply to an alternative jurisdiction to payments that are aimed at facilitating, ensuring the foreign official who fulfills the tasks (Diamant, Mrdjenovic, 2012; Strauss, 2013; Rohde, 2014; Bonstead, 2014; Ewald, 2016)²³⁴. The provision excludes the scope of application of the FCPA for small payments that do not include acts contrary to official duties and that involve the exercise of discretionary powers. These are standard, bureaucratic requirements where the issuance of permits, licenses, visas or other documents that are issued by the public administration and/or the assumption and protection of police officials who have access to electricity services and sanitary water. Excluded from the scope of application is the exception of finalized payments that ensure a new business or the continuation of the evolving business, aimed at convincing public and supervisory authorities to ignore the lack of requirements to continue today's business or the future one (Tarun, Tomczak, 2018; DOJ, SEC, 2020).

²³⁴15 U.S.C. §§ 78dd-1(b) for the “issuers” 78dd-2(b) for the “domestic concerns” 78dd-3(b) for the “others”. Deming explains that: “(...) these are areas in which the exercise of the official's powers can be characterized as “automatic” or that it is only a “matter of time” but that the result is a given (...)”.

The exception depends on the purpose of the payment and not on the size of the sum being paid (DOJ, SEC, 2020)²³⁵. The exception applies to a double limit. It does not concern the adoption of contrary acts and/or the exercise of discretionary powers and cannot consist of large sums that are contrary, modest or of courtesy (Tarun, Tomczak, 2018).

Causes of exclusion for the punishment of illicit payments (affirmative defenses)

The FCPA in the provisions of paragraph c) contemplates two possible causes that exclude the illicit nature of payments that are

²³⁵Which is affirmed that: “(...) to underline how the exception in question does not constitute an “affirmative defense” but excludes such payments from the scope of application of the case, draws attention to the regulatory change made to the original text of the FCPA on this point, which once excluded these payments with reference not to the purpose, but rather on the basis of the essentially bureaucratic functions covered by public officials. This provision, however, presented implementation difficulties, since the exact qualification of the official's duties was not always easy to discern. Therefore, the US legislator decided to modify the FCPA in 1988, shifting the attention from the duties of the official to the purposes of payment, in line with the general approach of the provision, thereby enhancing even more the task of the element subjective as a moment of determination and selection of criminally prosecutable conduct (...)”.

addressed to foreign officials: the legality and the promotional purpose of such expenses are not actionable for payments, gifts, offers, promises of any kind of value that constitutes a lawful activity under the local law of the public official and; expenses that are reasonable and made in bona fide as in the case of travel expenses, accommodation for a foreign official connected to the promotion and to the submission of products or services to a foreign government contract and/or articulation (DOJ, SEC, 2020).

According to the statement of domestic law no country characterizes corrupt payments as lawful as it is difficult to provide evidence that the payment that is under investigation is recognized as lawful according to national law as well as the silence of the law it is not sufficient to demonstrate a relative defense. It is noted that the classification of payments as lawful in various types of clauses can exclude the prosecution of the payment and/or of the person following it. According to the FCPA it is not sufficient to exclude the illegality of the payment which is sanctioned according to American law (Yockey, 2011; Tarun, Tomczak, 2018)²³⁶.

²³⁶Tarun and Tomczak affirmed that: “(...) the demonstration of non-prosecution according to local law is in itself sufficient to exclude the criminal sanction where the corrupt intent is demonstrated, since it is necessary to distinguish possible causes of non-punishability, or the non-

Domestic law establishes its lawful nature at the moment the payment is made without excluding the application of criminal sanctions. The FCPA excludes the application of the criminal sanction to payments that characterize the company's commercial activity in bona fide²³⁷. Payments cannot have the purpose of giving a public official decisions to hide, disguise accounting records and/or constitute unauthorized payments that violate the anti-corruption provisions on accounting regularity of the FCPA (DOJ, SEC, 2020).

This type of payments that are part of the legal system of the FCPA are susceptible to the assessment that the rule exposes to a discretionary application what disorientates the final recipient. The American authorities update and provide multinationals with some criteria that guide internal and control procedures, thus avoiding illicit behavior. Criteria that have to do with the

punishability of one of the subjects in improper multi-subjective crimes, for example extortion by coercion, from the lawfulness of the payment which - in truth - remains corrupt, according to the FCPA. In fact, to exclude the criminal relevance of the payment, “an imminent threat of physical harm” is required, while economic coercion, for example being forced to pay to access an order, falls within the scope of application of the case. In this case, in fact, we cannot speak of coercion, but rather of a deliberate and conscious, therefore actionable, choice to access an economic benefit (...)”.

²³⁷15 U.S.C. §§ 78dd-1(c)(2) for the “issuers” 78dd-2(c)(2) for the “domestic concerns” 78dd-3(c)(2) for the “others”.

legitimation of expenses and which concern: “(...) - the visit to company structures or operations; -training activities; -product demonstrations; - participation in promotional activities; - presence at company meetings (...)” (DOJ, SEC, 2020; Kang, 2023).

It is not sufficient to qualify the expenditure in bona fide and according to the methods that occur and may betray the illicit purpose. Please note that some guidelines prevent multinationals from incurring the criminal sanction that is provided for by the FCPA. Thus it is ensured that: “(...) - the public officials involved are not pre-determined, or are so according to criteria of merit; - payments are made directly to the suppliers of the transport or accommodation service, or that the reimbursement to the public official is made only upon presentation of the receipts; -expenses are not anticipated or reimbursed in cash; -the indemnities awarded are effectively commensurate with the costs that will presumably have to be faced, and are limited to reasonably necessary expenses; -expenses are treated with transparency, both towards the company and the foreign government; -the expenses are not conditioned on the behavior of the public official; -the company obtains a written declaration that the payment is not contrary to local law; - the payments do not exceed the value of the costs actually incurred; -the payments are correctly recorded

in the company's accounting books (...)” (DOJ, SEC, 2020).

Criteria that contribute towards the path that avoids the operational choices of multinationals and which have an illegal character according to the FCPA model. This is an ex post evaluation where the observance of the criteria just mentioned helps to avoid that these expenses are contested by the DoJ and entail the criminal liability of the multinational.

On the contrary, the criteria just referred to can also contribute to the qualification of expenses that are illicit and that transcend the criteria of reasonableness and the need to use various criteria that are different from those that are chosen by the company for its employees. It is necessary to protect expenses of this type in designing approval processes since it is necessary to make a way for the structure that avoids and exceeds the limits that are exposed by the FCPA (Tarun, Tomczak, 2018).

Injunctive relief

The anti-corruption provisions set out in paragraph d) of the FCPA in relation to the domestic concerns and the others allow the Attorney General to pursue injunctions against corrupt practices that are ongoing and are committed by granting inspection and investigative powers that are not fulfilled and

which can sanction a contempt²³⁸.

It allows the Attorney General to obtain injunctions which are excluded in the case of issuers and when are applied in relation to the other two categories of subjects targeted by the FCPA. It represents a way of combating the phenomenon of international corruption which is an alternative to criminal sanctions. The Congress recognized the possibility of bringing civil actions to the DOJ put an end to a phenomena of this type in the case of non-issuer companies. This is an alternative that has not found application to the preference for criminal sanctions (Koehler, 2012).

Attorney General's guidelines

The FCPA in the relevant anti-corruption paragraphs no. d) and e) respects the issuers and the domestic concerns that provide that the Attorney General periodically issues guidelines and procedures that comply so as not to violate it²³⁹.

The provisions of the FCPA involve substantive issues in evaluation that are not unambiguous and do not provide

²³⁸15 U.S.C. §§ 78dd-2(d) for the “domestic concerns” 78dd-3(d) for the “others”.

²³⁹15 U.S.C. §§ 78dd-1(d) for the “issuers” 78dd-2(e) for the “domestic concerns”.

sufficient margins of predictability. The provisions are disregarded due to excessive vagueness which leads to their discretionary application where Congress has provided that the competent authorities have issued two types of information, namely: “(...) - guidelines with examples of conduct compliant with the provisions of the FCPA, so that international businesses can comply with existing and future business practices; - precautionary procedures which subjects can comply with to avoid that the adoption of different models could lead to criminal liability in the event of the commission of offenses (...)” (Shabat, 1999; Doty, 2007).

Already in 2012, the DoJ and the SEC with the Ministry of Commerce have drawn up a relevant Guide with information suitable for limiting the objective scope of application of the anti-corruption provisions and which reserves for multinationals that have identified examples of payments that are permitted at times essential parts of the compliance programs that the DoJ considers to be effective (DOJ, SEC, 2020). The multinationals through negotiated resolution agreements in international corruption cases create clauses that accept as a model the requirements that are essential to conform the company's organization, control and management models to the FCPA (Doty, 2007)²⁴⁰.

²⁴⁰See the case: *Metcalf & Eddy*, in *U.S. v. Metcalf & Eddy, Inc.*, No. 99-cv-

Attorney General's opinions

The anti-corruption provisions of the FCPA provided for in paragraphs e) and f) relating to issuers and domestic concerns take into consideration that subjects can request a ruling from the general prosecutor's office, thus receiving an opinion of compliance with a specific conduct that respects the current policy of application of the anti-corruption provisions of the FCPA by the DoJ (DOJ, 1980; Kaufmann, Kraay, 2002; Kaufmann, Kraay, Mastruzzi, 2007; Juneja, 2014; Kang, 2023)²⁴¹.

The subjects are different from securities issuing companies and American natural and legal persons and are excluded from the possibility of not having a solid connection with the US and which constitutes an unreasonable measure that puts the office in continuous work with requests that come from such subjects. The law provides for a rapid response within thirty days of the request for a ruling, the deadlines having elapsed until the information necessary to take charge of the investigation is filed. The representative has the obligation to provide the indications and

12566ng (D. Mass. filed Dec. 14, 1999).

²⁴¹15 U.S.C. §§ 78dd-1(e) for the “issuers” 78dd-2(f) for the “domestic concerns”.

details of the case which without omission constitutes a basis to allow the initiation of criminal proceedings against the applicant (Deming, 2014a).

In particular the SEC does not contain a similar start-up procedure. The authority complies according to the opinion left by the DoJ and does not continue operations that have obtained a positive opinion. From the moment the opinion is issued, it has the effect of a presumption *iuris tantum* and is binding for the authority and for the party requesting it with general effect. Subjects who are in the same condition as those who have undergone the envisaged procedure cannot benefit from it.

The authority has the power to request information provided to acquire certifications and documents on all parties involved in the economic transaction to which the request for opinion refers and maintaining the relative administrative silence for all information and the related procedure. The request cannot be generic, hypothetical but rather a correct proposal in a specific, complete manner and in terms of information that is attached to the relevant question. The ruling does not preclude the initiatives of the DoJ regarding the related activity. The authority is free to initiate any investigation that is necessary in parallel with the request. For this reason the institute has not found full application (Doty, 2007).

Once issued, the opinion is binding for the applicant and has no margin of action to carry out the operation. The request is not withdrawn at any time before the issuance of the opinion remains with the authority of the faculty to use the information to be received (Deming, 2014a).

Penalties

The FCPA also includes relevant limits on penalties that are applicable for violations that are contained herein²⁴².

These are civil and criminal. Criminal sanctions are part of pecuniary sanctions for natural and legal persons and/or prison sentences for natural persons. The criminal penalty imposes on legal entities that the violation is equal to two million dollars. Added to this is a fine of 10 thousand dollars. For natural persons there is a criminal fine of up to 100 thousand dollars and/or imprisonment of up to 5 years and/or both. For legal entities, a fine of up to 10 thousand dollars is foreseen.

The text provides that economic sanctions are imposed on natural persons. They cannot be paid by legal persons according to the dependencies that operate on such natural persons. The

²⁴²15 U.S.C. §§ 78ff(c) for the “issuers”. V. 15 U.S.C. §§ 78dd-2(g) for the “domestic concerns” 78dd-3(e) for the “others”.

provisions are not exhausted in the relevant catalog of the applicability of sanctions. Corrupt conduct that is prohibited under the FCPA is punishable under the law that is part of the Alternative Fines Act²⁴³.

This is a sanction that cannot be imposed and which is up to double the profit and the relative damage resulting from the illicit

²⁴³18 U.S.C. § 3571, which the court affirms that: “(...) (a) In General.-A defendant who has been found guilty of an offense may be sentenced to pay a fine. -Fines for Individuals.-Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of the amount specified in the law setting forth the offense; the applicable amount under subsection (d) of this section; for a felony, not more than \$250,000; for a misdemeanor resulting in death, not more than \$250,000; for a Class A misdemeanor that does not result in death, not more than \$100,000; for a Class B or C misdemeanor that does not result in death, not more than \$5,000; or for an infraction, not more than \$5,000. Fines for Organizations.-Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of the amount specified in the setting forth the offense; the applicable amount under subsection (d) of this section; for a felony, not more than \$500,000; for a misdemeanor resulting in death, not more than \$500,000; for a Class A misdemeanor that does not result in death, not more than \$200,000; for a Class B or C misdemeanor that does not result in death, not more than \$10,000; for an infraction, not more than \$10,000. Alternative Fine Based on Gain or Loss.-If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to

conduct (Tarun, Tomczak, 2014). The relevant sanctions application procedure is regulated by the specific Guidelines and the seriousness of the crime is taken into account in terms of the offense and the degree of culpability²⁴⁴. In this process, collaboration and assumption of responsibility can mitigate the sanction which can reach enormous values (Tarun, Tomczak, 2014). The criminal and civil sanctions are aggravated by the restitution of the profit. At the end is added the payment of a sum by way of disgorgement (Hood, 2022). This is equal to the size of the profit. In the SEC and DoJ cases reaches double the value of the profit (Benjet, Kurtz, 2022).

a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process. Special Rule for Lower Fine Specified in Substantive Provision.-If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense (...)"

²⁴⁴UNITED STATES SENTENCING COMMISSION, Guidelines Manual (2016):<https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf>

Definitions

The anti-corruption provisions of the FCPA which are provided for in paragraphs f), h) and g) relating to issuers and domestic concerns and the others provide for the definition of notions that are relevant for criminal application²⁴⁵. The text of the FCPA has many interpretative difficulties that comply with specific requirements. The section of the regulatory act highlights and contributes to a more unambiguous interpretation. The related definitions concern aspects of the case starting from the notion of foreign public official and which constitute aspects that are controversial of American discipline as reported above (Koehler, 2014b).

In the same paragraph, a further definition of the elements of the case which are essential for the application of the anti-corruption provisions is completed, such as the related requirement of awareness of the destination of the sums paid to intermediaries (knowing), the exception for payments relating to tasks routine (routine governmental action), and even the notion of “interstate commerce” (...), as elements that we have already seen so far in the previous paragraphs.

The presence of the definitions contributes to a precise

²⁴⁵15 U.S.C. §§ 78dd-1(f) for the “issuers” 78dd-2(h) for the “domestic concerns” 78dd-3(f) for the “others”.

knowledge of the content of the law which favors one's own interpretation confirming the margins which are varied and wide according to the practice of the DoJ and its own extensive interpretation.

Alternative jurisdiction

The anti-corruption provisions provided for in paragraphs g) and I) of the FCPA. These are related to issuers and the domestic concerns. They provide for some criteria of an alternative and additional nature that determine the jurisdiction of the US for acts of corruption that are committed by such subjects²⁴⁶. These criteria are alternative and examined in the previous paragraphs. They extend to American jurisdiction and to events that occurred outside the borders of American territory and which are committed through any form of conduct.

The global reach of the FCPA with its ordinary and auxiliary jurisdiction criteria extends the application of its anti-corruption provisions. This is an essential point since the global character of the FCPA represents the basis on which American anti-corruption law is built and implemented not only with respect to world

²⁴⁶15 U.S.C. §§ 78dd-1(g) for the “issuers” 78dd-2(i) for the “domestic concerns”.

powers but also on foreign multinationals who are called upon to adapt to the relevant discipline of American nature (Willborn, 2013).

PART 3: Fight Against International Corruption, “Hegemony” of American Criminal Law and Involvement in Multinational Enterprises²⁴⁷

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“Books, records and internal controls provisions”: Alteration of accounting records

The Watergat scandal was the trigger for stringent anti-corruption measures in terms of regulating accounting books and in terms of effectiveness in the anti-corruption sector (Deming, 2010a; Koelher, 2014; Tarun, Tomczak, 2018). Among the objectives was the prevention of the falsification of company accounts as well as the perpetration of conduct that had a corrupt nature (SEC, 1976; Hutchison, 1980; Feller, 1982; Isaak, 2008; Finder, McConnell, Mitchell, 2009; Stuckwisch, Alexander, 2013). These provisions are not connected with the limits applied in the anti-bribery provisions (Koehler, 2014a; Soreide, Makinwa, 2020).

The provisions are exclusive to companies issuing securities

²⁴⁷The third part of the present book is written by Christopher Marshall, PhD, Attorney at Law, US.

traded on the American market and are dictated for issuers²⁴⁸.

In FCPA section the related obligations: “(...)–maintain accounting in a reasonably detailed manner, so that it correctly and accurately reflects the transactions and operations carried out; - establish and maintain internal accounting control systems; - ensure that transactions are carried out with authorization or in accordance with pre-established general policies; -transactions are recorded in such a way as to allow the expected corporate communications to comply with generally accepted accounting principles and to maintain responsibility for the same; - access to resources is permitted with authorization or in accordance with pre-established general policies; -the data reported in the accounting are periodically verified in reality, and in case of divergences the appropriate countermeasures are undertaken (...)” (Tarun, Tomczak, 2014). However, one of the elements that characterize the criminal case is missing (DOJ, SEC, 2020; Benjet, Kurtz, 2022)²⁴⁹.

²⁴⁸15 U.S.C. §§ 78m.

²⁴⁹“(...) Even if the conduct is not committed through the use of interstate communication and commerce tools, the transaction may still be relevant pursuant to the provisions regarding the correct keeping of accounting records, precisely because these provisions are not bound to the applicability of the anti-corruption provisions, nor the limits and requirements contained therein (...)”.

The application of accounting provisions is varied (Parker, Rapp, Noel, 1979; Koehler, 2014a). The law defines the notion of accounting books and records as: “(...) any document or information transcribed manually or automatically thus embracing any information on corporate activity²⁵⁰, and furthermore completely ignores the requirement of “materiality” for violations, thereby preparing an all-encompassing protection (...)” (Tarun, Tomczak, 2018). Judges are varied and specific to overcome the relative vagueness in the sector²⁵¹. The core of the provisions effectively clarify that the conduct: “(...) -completely failing to record a transaction; -in failing to record some qualitative aspects of the transaction, revealing its illicit or improper nature; -in altering the content of the recording are hiding illegal aspects (...)” (Cruver, 1999; Deming, 2010b). Transactions involving this type of conduct and in violation of the FCPA concern: “(...) -payments of significant amounts intended for foreign public officials of medium or high

²⁵⁰15 U.S.C. §§ 78c(a)(37) which is affirmed that: “(...) the term “records” means accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language (...)”.

²⁵¹See the Jensen case, in U.S. v. Jensen, 532 F. Supp. 2d 1187 (N.D. Cal. 2008). United States v. Mark Daniel Allen (E.D. Tenn.) of 1st September 2021. United States v. Kesha Harris (S.D. Tex.) of 20 May 2021.

hierarchical level; -facilitatory payments of small amounts intended for low-level public officials; -bribes and kickbacks; -political contributions; -charitable donations; -smuggling activities; -tax violations; -customs or currency violations; -expensive gifts (...)” (Goelzer, 1998; Giraudo, 2005; Dalton, 2005; Tarun, Tomczak, 2018).

Multinationals adopt internal control systems that are very precise and stringent to prevent, intercept and avoid violations which include: “(...) -the satisfaction of the highest ethical and integrity requirements; -the complete risk assessment; -control over effective compliance with the directives (e.g. the regime of approvals, authorizations, separation of duties); -the adequacy of the information and communications necessary for the purpose; -internal monitoring (...)” (DOJ, SEC, 2020).

In reality, there is no single model of internal controls that are sufficient and effective at a global level since the type of activity carried out by companies varies (Koehler, 2018a). The internal control systems are structured with the aim of significantly reducing the risk of crimes and the related parameters that have to do with the products and services offered by the company in the ways that are offered on the market, in the type of workforce that produces the related activities and capabilities that interconnect with public entities, with operations in countries that

are at risk of corruption (DOJ, SEC, 2020).

Various forms of corruption have occurred in practice. The expenses that are addressed are identified and the processing process in the internal control systems is taken into account. In particular, the following types are taken into consideration: “(...) - commissions on royalties; -fees for consultancy; -sales and marketing expenses; -incentives or scientific studies; -travel or entertainment expenses; -reductions or discounts; -compensations for after-sales services; -“miscellaneous” expenses; -small cash withdrawals; -free goods; -current accounts jointly held between companies; -payments between supplier and seller; -cancellation of credits; -payments for customs clearance (...)” (Tarun, Tomczak, 2018).

The list is not exhaustive and the expense items are automatically found to be in violation of the FCPA. Incorrect accounting in corporate documents entails the application of the foreseen sanctions even if the functional connection with corruption hypotheses is not demonstrated. Such violations come with more severe penalties. The FCPA provides for a fine of up to \$5 million and up to 20 years in prison for individuals and up to \$25 million for corporations for any type of violation²⁵².

The responsibility of multinationals also extends to conduct of

²⁵²15 U.S.C. §§ 78ff (a).

the company that controls the participation of the parent company who has the obligation to carry out every activity necessary to guarantee compliance with the provisions when the violation affects the consolidated financial statements and corporate communications of the same (Didorkina, 2013)²⁵³.

The overall picture is aggravated by the obligations deriving from the 2002 approval of the Sarbanes-Oxley Act (SOX) which requires company top management to periodically sign the certifications attesting to the authenticity and completeness of the data reporting the company documentation, the suitability of the control systems and the communication to the competent bodies of any deficiencies in them²⁵⁴. The provisions on conspiracy are also applicable to such conduct²⁵⁵ and especially in the sector of forgery²⁵⁶, money laundering²⁵⁷, postal²⁵⁸ or telephone fraud²⁵⁹; to a set of federal provisions that allow the fraud section of the DoJ to impose heavy sanctions on this type of conduct (Clarke,

²⁵³DOJ, SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA), op. cit., p. 50. See also the case: Order, SEC v. ENI S.p.A., op. cit.

²⁵⁴15 U.S.C. § 7201ss.

²⁵⁵18 U.S.C. § 371.

²⁵⁶18 U.S.C. § 1001.

²⁵⁷18 U.S.C. §§ 1956, 1957.

²⁵⁸18 U.S.C. § 1341.

²⁵⁹18 U.S.C. § 1343.

Braude, 2008; Clarke, Nye, 2011; Tarun, Tomczak, 2018).

The effectiveness of accounting provisions constitutes the main reasons for success in the American anti-corruption model. Most sanctions are imposed for accounting violations and can originate from autonomous investigations by the competent authority and the voluntary disclosure of multinationals (Koehler, 2018b).

How efficient is the American model?

The FCPA as an effective anti-corruption model also adapts to corporate policies regarding accountability (Urofsky, Moon, Rimm, 2012; Ashcroft, 2012; Park, 2013; Koehler, 2016).

Over the years, the number of corruption cases originating from multinationals has increased (Koehler, 2016). The factors for this increase and the application of the FCPA are varied and numerous. Perhaps on the one hand, economic change and international commercial transactions have recorded and multiplied the opportunities for corruption where companies with securities traded on the American market (issuers) expanding the subjective scope of application (Staff, 2008).

The policies of federal agencies, such as DoJ and SEC, are different. They are collected as pieces of evidence that have the following options: proceed, indict and/or desist. The methods of

settlement negotiations in the area of international bribery through the FCPA are presented as revolutionary. The FCPA presented itself as a new era that fights corporate liability without involving individuals. After the changes of 1988, the responsibility for the conduct of intermediaries, with the exception of criminal relevance and the prosecutability of payments, affects the notion of foreign public official²⁶⁰. After 1998, the conduct committed in American territory was extended to the jurisdiction that includes conduct committed abroad by American natural and/or legal persons²⁶¹.

By 1990, the SEC could impose civil monetary penalties on numerous violations, including those of the FCPA²⁶². In 2006, the approval of the Alternative Fines Act made it possible to connect with the sanctions and limits provided by the FCPA, i.e. of double profit which deals with corruption²⁶³. Since the second half of 2000, federal agencies have shown an increasing use of disgorgement which also opens the way to imposing financial

²⁶⁰15 U.S.C. §§ 78dd-1(c) and (f) for the “issuers” 78dd-2(c) and (h) for “domestic concerns”.

²⁶¹15 U.S.C. §§ 78dd-3(a); 78dd-1(g); 78dd-2(i).

²⁶²Securities Enforcement Remedies and Penny Stock Reform Act del 1990, Pub. L. 101-429 (Oct. 15,1990).

²⁶³18 U.S.C. § 3571.

penalties (Tarun, Tomczak, 2018)²⁶⁴.

Overall, the legal international transplant has achieved modest and unsatisfactory results on the formal transposition of regulatory provisions and on concrete application²⁶⁵. The actions of the DoJ and the SEC are aimed at foreign multinationals. The need to address the American model not as a *de iure condendo* perspective but as a *de iure condito* perspective given that is a foreign discipline, is applied to multinationals, thus entailing the need to deal with the discipline of foreign countries societies.

Indices of a universal application

The extraterritorial application and the consistency of the number of sanctions inflicted on foreign multinationals are not the only indicators from which to deduce the suitability of the FCPA to have universal scope (Buchheit, Reisner, 1998).

The data collected by the Stanford University Observatory show an unequivocal trend, which highlight the unstoppable rise of the

²⁶⁴See the case: *Kokesh*, in U.S. S.Ct. *Kokesh v. SEC*-137 S. Ct. 1635 (2017) for the nature of the “disgorgement”.

²⁶⁵See the Report elaborated from the WGB of OECD entitled: “2018 Enforcement of the Anti-Bribery Convention. Investigation, proceedings, and sanctions”: <https://www.oecd.org/daf/anti-bribery/OECD-Anti-Bribery-Convention-Enforcement-Data-2019.pdf>

FCPA. These are quantitative and qualitative indices which overall confirm the global inquisitor function of the American investigative and sanctioning apparatus.

Sanctions and their increasing extent

The efficiency of the American system has shown an increase in the size of sanctions imposed (Stevenson, Wagoner, 2011; Hinchey, 2011; Koehler, 2018a). The adoption of the Alternative Fines Act of 2006 was a determining factor. The law approved in the second half of the 2000s allowed sanctions for violations of the FCPA to be released from the limits that are provided for in the legislative text which is measured by the amount of profit.

This behavioral activity has exacerbated the fines imposed on multinational companies alleging international corruption²⁶⁶.

The adoption of the Alternative Fines Act, and of the FCPA have resulted in fines totaling approximately \$265 million. Fines imposed by American federal agencies exceed 23 billion dollars. From 11 million dollars before 2007 to fines we have passed to over 1.4 billion dollars in 2007. This shows a significant increase in total numbers. Moreover, this trend is also verified in the

²⁶⁶“Total and Average Sanctions Imposed on Entity Groups per Year”, from the Stanford Law School’s Foreign Corrupt Practices Act Report Clearinghouse.

Andrade case, a former member of the Venezuelan treasury who was sentenced to ten years in prison and to over 1 billion dollars in fines²⁶⁷. From 2007 to 2016, the total value of sanctions imposed on individuals exceeded 320 million dollars, i.e. thirty times more than in the first thirty years of the life of the FCPA.

As regards the average values, since 2007 there have been around 35 thousand dollars in fines. Since 2007 and without taking the Andrade case into account, the numbers have reached in average more than 650 thousand dollars. Sanctions issued starting from the adoption of the Alternative Fines act of 2006 and which make the FCPA a severe and undisputed instrument of the repressive capacity of international corruption conduct.

Compliance obligations and tax increases

The increase in cases of sanctions imposed does not exhaust the quantitative indicators, symptomatic of the global vocation of the FCPA. On the part of the DoJ, the sanctioned multinationals

²⁶⁷See the case: Andrade, in Plea Agreement, U.S. v. Alejandro Andrade Cedeno, No. 17-cr- 80242-RLR (S.D.C. Dec. 12, 2017). US. v. Gabriel Arturo Jimenez Aray: Docket n. 18-cr-80054-RLR; US. v. Alejandro Andrade Cedeno: Docket n. 17-CR-80242-RLR; US v. Claudia patricia Diaz Guillen_ Docket n. 18-CR-90160-WPD; US v. Adrian Jose Velasquez Figueroa: Docket n. 18-cr-80160-WPD.

adopt and implement internal control procedures trying to prevent new cases of international corruption. Compliance requests concern less than 30% of cases. The percentage of cases requiring multinationals to assume compliance obligations exceeds 68%²⁶⁸.

This increase is significant in terms of sanctioning and preventive capacity. A greater capacity of the American federal agencies is attested and the legislative instrument is the subject of analysis of impositions of high pecuniary sanctions as well as obligations that prevent the sanctioning crime with an appreciable effectiveness of the cases. The growing incidence of compliance obligations tends to exclude that the FCPA is unique in sanctioning hypothetical cases of international corruption, thus showing the capacity that affects the prevention of conduct within the sanctioned company which is called upon to adopt new and efficient models of such type of conduct and within the sanctioned company which is called upon to adopt new, efficient control models and procedures by the community of economic operators who look at obligations imposed on the target company as ideas for improving the protocols that prevent illicit and consequent behavior sanctions under the FCPA.

²⁶⁸“Compliance Obligations”, collected by Stanford Law School’s Foreign Corrupt Practices Act Report Clearinghouse.

The increasing involvement of intermediaries

Even in the cases of intermediaries, there is an increase in the interception of international corruption cases. FCPA and federal agencies have detected that bribes are channeled through third-party intermediaries such as agents, shell companies and consultants. Before 2007 the percentages involved third states and were around 79%. later the percentage became 92%²⁶⁹.

Growth in the absolute number of proceedings and in the size of the sanctions imposed are attributed to an activism between the DoJ and the SEC that responds to a utilitarian perspective that changes the sanctioning framework such as the increase in compliance obligations and cases involving intermediaries who are representative of the particular ability of the FCPA to prevent cases of international corruption such as the suitability of the instrument which remains outside the federal policies.

²⁶⁹See the: “Third-Party Intermediaries Disclosed in FCPA- Related Enforcement Actions”, collected from the Stanford Law School’s Foreign Corrupt Practices Act Report Clearinghouse.

Geographical extension and qualitative indices

The FCPA has been shown by the previous paragraphs to be difficult to apply extraterritorially. But it had a propensity to capture its networks as foreign entities of a multinational, i.e. as facts of global corruption (Wallenstein, 2010; Warin, Diamant, Pfenning, 2010).

It is a legislative instrument that punishes bribery and bribery of a foreign official. It is not surprising that the sanctions imposed under the FCPA concern global officials. The recorded cases involve facts and officials from different countries that no geographical area of the planet is impenetrable (McClean, 1982; Lee, Slear, 2007)²⁷⁰. Data concern illicit payments involving large areas of Africa, Asia, North and South America and the whole of Europe²⁷¹. The geographical extension is capable of

²⁷⁰McClean affirms that: “(...) the US authorities carefully select the states towards which they direct their axe, since they tend not to jeopardize diplomatic relations with those countries with which they share political and economic interests. In this regard, consequently, we cannot avoid noting that, according to data collected by Stanford University, most of the corrupt conduct concerns China, a country whose diplomatic and economic relations with the United States are, as is known, particularly fluctuating (...)”. See also in argument the: “Location of Misconduct Alleged in FCPA-Related Enforcement Actions (by Country)”, collected by Stanford Law School’s Foreign Corrupt Practices Act Report Clearinghouse.

²⁷¹“Location of improper payments 2011-2020”, collected by the Stanford

capturing and sanctioning international corruption where it occurs.

Corporate operations v. economic transactions

Sanctions against multinationals for international corruption affect the company's income statement and hinder its dimensional development, thus preventing corporate M&A operations. The inefficiency of a sanctioning system sees the legislative instrument succumbing by respecting the sophistication of the aforementioned operations, thus allowing the company to remain unscathed from the repercussions of such misdeeds. The data collected and reported show that already more than 50% of M&A operations involve the application of sanctions by the company resulting from the corporate operation²⁷².

This data is not sufficient to provide answers to the question of the number of corporate transactions that are closed and not initiated concurrently with the initiation, i.e. the pending proceedings for violation of the FCPA, determining thus the

Law School's Foreign Corrupt Practices Act Report Clearinghouse.

²⁷²“Corporate Actions Initiated per Year Involving M&A and Successor Liability”, collected by Stanford Law School's Foreign Corrupt Practices Act Report Clearinghouse.

events that are related by a relationship of causality.

Half of the suspects resulted in the application of a sanction to multinationals which appears to be a corporate operation that allows for the formulation of some elements under discussion. It is sufficient to exclude that the FCPA is ineffective for M&A operations. A concrete risk arises which takes into consideration the due diligence activity when the sanctions pursuant to the FCPA survive the M&A operations and which imposes the related result on the legal entity. The FCPA in the procedures of internal control systems for multinationals does not constitute a dangerous limit towards the American authorities and in the development prospects of the company when they pass through M&A operations.

Corrupt forms and their plurality

The global nature of the FCPA constitutes the American legislative instrument to capture forms that manifest themselves in illicit conduct. The 90% of corruption cases sanctioned under the FCPA involve illicit payments made by foreign officials²⁷³.

International corruption was based on the system of “sealed

²⁷³“Types of Bribes Alleged in FCPA-Related Enforcement Actions”, collected by Stanford Law School’s Foreign Corrupt Practices Act Report Clearinghouse.

envelope offers” as also happens in domestic law. The payment of sums of money in the order of hundreds of millions of dollars is also recorded. The dynamics seem the same and explain that the extent of illicit payments is worth the profit of corruption.

International corruption can also have alternative forms of expression from sums of money. Trying to measure the suitability of a regulatory instrument that intercepts illicit acts of corruption in disparate manifestations takes on relevance with travel costs, accommodation, expenses relating to entertainment or catering activities, luxury gifts and, technology that constitute violation to the FCPA. It tends to exclude that petty corruption as a cost item conceals illicit conduct and which entails the responsibility of the multinational.

The sanctions track: civil, criminal, administrative

The FCPA has a double nature in international corruption for the falsification of accounting records²⁷⁴. Violations have two different authorities as we said the DoJ and the SEC (Sweeny, 1982; Shine, 1982; Garney, Esser, 2006; Mark, 2012; Casino,

²⁷⁴15 U.S.C. §§ 78dd-1(a) for the “issuers” 78dd-2(a) for the “domestic concerns” 78dd- 3(a) for the “others” in the relevant provisions for the international corruption. See also: 15 U.S.C. §§ 78m for the provisions regarding the correct keeping of accounting records.

Maberry, 2013; Grindler, Bennett, 2015; Grusman, 2015). The functions of the two agencies appear to partly coincide and act in harmony with constant collaboration. The nature of the action that leads to such violations seems different. These are violations of a civil, criminal, administrative nature that differ from subjects where the conduct appears to have jurisdiction (Tarun, Tomczak, 2018).

The DoJ prosecutes violations of the FCPA as both a criminal and civil action. The SEC takes criminal action that prosecutes the violation in civil or administrative proceedings (Koehler, 2018b). The civil nature leads to the application of sanctions that are less rigorous and severe. Therefore the plea as we have seen from the DoJ excludes criminal prosecution. The test regimes are different. In criminal proceedings it must be demonstrated that: “(...) beyond any reasonable doubt (...) while in the civil context the preponderance of the evidence is sufficient (...) which is why the choice of action to undertake can actually depend on the solidity of the elements collected by the authority (...)” (Tarun, Tomczak, 2018). This is an aspect that is relevant and concerns the alleged violation. The anti-corruption provisions are specific, rich in details and, also broad in repressing this phenomenon, where the provisions regarding accounting records remain proven by the facts and which impose a less onerous evidential burden

which is easy to apply and which leads to more rigorous sanctions (Deming, 2006).

The burden of proof is sanctioned through civil and/or criminal action. The violation is shown to be intentional. The agent has the provision violated and it must be proven that he also intends to correctly omit the operation. In the context of civil action this requirement appears to be absent and the attribution of responsibility has an objective nature where the SEC obtains the signature of an agreement from an investigated company (Tarun, Tomczak, 2018). The choice between civil action and administrative injunction is subject to negotiation between the parties involved (Atkins, Bondi, 2008). The civil action perceives that part of the company that committed the violation burdens the violation that requires the application of a penalty where the SEC has no choice to act but only the civil venue until at least 2010 (Harnishch, Colton, 2005; Heinrich, Hodess, 2011; Koehler, 2018a).

The FCPA showed that a third of authorities initiatives are closely linked. DoJ and SEC exchange information and even reach parallel agreements with the target company on which they impose financial sanctions²⁷⁵. The percentage of shares are

²⁷⁵“Related Enforcement Actions per Year”, collected by Stanford Law School’s Foreign Corrupt Practices Act Report Clearinghouse.

combined and high exceeding 75%. The principle of double jeopardy has been interpreted by the Supreme Court as: “(...) does not, however, prevent this practice (...) applies exclusively to punitive sanctions of a criminal nature (...) has not excluded that a de facto criminal sanction may preclude the application of a subsequent one, however it is necessary to exclude that the first is expressly qualified as a civil sanction by the law, and that the same is not excessively disproportionate as to transcend the civil or administrative nature, reaching a substantial criminal nature (...)” (Van Alstine, 2012; Davis, 2016; Yamamoto, 2020)²⁷⁶.

All violations of the FCPA end with a negotiated agreement that avoids the establishment of a proceeding that is common between the parties. The agency avoids objections on the legal basis of the dispute. The multinational avoids negative repercussions of a financial and reputational nature (Kim, 2020). The judicial hypothesis is rare as we can see from the OECD WGB figures which can also be points of arrival (Koehler, 2018b)²⁷⁷.

The procedural system of case resolution is the origin which has a positive impact in the suppression and prevention of corruption (Koehler, 2016).

²⁷⁶See the case: *Hudson v. United States*, 522 U.S. 93 (1997).

²⁷⁷See the Report from the WGB entitled: “2018 Enforcement of the Anti-Bribery Convention. Investigation, proceedings, and sanctions”, *op. cit.*, p. 3ss.

Negotiated resolution of international corruption allegations

The data coming from and processed by the DoJ and SEC do not allow us to arrive at concrete elements of fact. Over 80% of investigations lead to the formulation of hypotheses where the violation of the rules of the FCPA (Koehler, 2018a)²⁷⁸ establishes jurisdictional proceedings especially against multinationals which emerges in a clear preference for alternative methods of corruption cases as well as in agencies federal funds for the company that is the subject of the investigation (Koehler, 2018b). For DoJ more than 438 have had a basis in negotiations noting that the 406 civil and criminal actions violating the FCPA have led to a signing of 438 final agreements. In the SEC, 246 civil and administrative actions for violation of the FCPA are settled only up to 2,98²⁷⁹. Any proceeding that leads to a settlement turns out to be rare in cases where a multinational enterprise disputes the charges that are addressed to the DoJ and the SEC.

²⁷⁸“Types of Investigation Resolutions”, collected by Stanford Law School’s Foreign Corrupt Practices Act Report Clearinghouse.

²⁷⁹“DOJ and SEC Enforcement Actions per Year”, in the matter of “Types of DOJ Resolutions” and in the “Types of SEC Resolutions”, collected by Stanford Law School’s Foreign Corrupt Practices Act Report Clearinghouse.

Identified agreements and prevention of international corruption

The resolution system through a negotiated agreement in the case of international corruption is formed on three different bases, namely the ability to conclude an interception agreement, sanction and prevent the commission of the violation of the FCPA.

The incriminating cases are structural and are not in themselves sufficient to guarantee the effectiveness of the action to combat the phenomenon. A crucial role is played by the sphere of application of the figures of the crime, i.e. the rules of the procedural systems that find a concrete application.

These are tools that play a fundamental role starting from the emergence of the international corruption phenomenon. The discovery of violations of the FCPA is not the investigation of the DoJ and the SEC. It derives from the phenomenon of disclosure that multinationals voluntarily carry out towards agencies (Koehler, 2018a).

This phenomenon is caused by a system of agreements. An agreement that contemplates economic sanctions that are reduced and that avoids the company having to proceed with a guilty verdict that plays a decisive role. The multinational is

incentivized when faced with crimes committed where timeliness does not cooperate and does not consider the authorities in a positive manner in the treatment of violations.

After the conclusion of the agreement, the multinational continues to have a source of knowledge of possible violations of the FCPA. The agreements include a specific obligation to inform the American authorities of any violation of the FCPA. The agreements include an obligation to inform the American authorities of any violation of the FCPA. This obligation is capable of invalidating the relevant agreement if the company complies with the signed clause. Companies accuse competing operators and widen the pool of information accessible to the investigating authority.

It is a system that is self-sustaining given that the voluntary disclosure is functional to the signing of an agreement which is a preferable solution for the multinational that discovers that it has committed a violation of the FCPA. It is the same agreement that causes the disclosure of other multinational companies who have reason to believe that the company sanctions and presents facts that are incriminating.

The FCPA sanctions acts of corruption and prevents illicit enrichment which is part of the most frequent use of the institution of disgorgement (Warin, 2011, Koehler, 2020; Tarun,

Tomczak, 2018).

The condition of signing an agreement with both the DoJ and the SEC is a formal commitment for the multinational that assumes its own internal compliance systems in order to prevent the crime and the adhesion of monitoring programs which involves an examination of the activities and of the company's progress in fulfilling the obligations that are signed with the agreements, the inspectors who refer to the authority as well as to the company (Doty, 2007).

The adoption of internal control systems constitutes negotiated justice. The intention of the extent of the financial penalties are accepted by the multinationals that join. In the preventive function, this type of agreement differs from any other system. They allow the phenomenon to emerge in a unique way and are rewarding. The stigmatization of the phenomenon through the imposition of high sanctions is not allowed. These agreements have a role in encouraging the company to sanction new compliance programs that are efficient in preventing future corrupt conduct and which accompanies a path that occurs upon progress in achieving their objectives (Beswick, 1982; Best, 1996; Biegelman, Biegelmen, 2010; Binkovitz, 2013; Carpenter, Stutsman, 2014; Boedecker, 2015; Carpenter, 2015; Armour, Garrett, Gordon, Min, 2020).

This type of agreement allows the creation of outlines for a new model of organisation, control and management of multinationals which are definitively called to adapt.

Common aspects of the structure of early dispute resolution agreements

The possible alternatives that prosecute or not the natural and legal person who is the object of investigation was now a consolidated practice (Koehler, 2020). The perspective is different and multinationals accuse of having committed violations of the FCPA that enter into an agreement with the DoJ and the SEC (Zhang, 2020).

The structure of the agreement may depend on the severity of the allegations, the degree of time that collaboration with the authority has been part of society and the strength of the evidence collected (Koehler, 2018a). These are common elements that are based on some assumptions such as: “(...) -the negotiation of the clauses before their signing; -acceptance of the agreement as an alternative to the trial; -the absence of judicial control over the content (...)” (Tarun, Tomczak, 2018).

In cases of violation of the FCPA some formal differences are dictated by the type of agreement as well as in the content of the

formulas of the DoJ and SEC which do not differ significantly. The negotiation phase is essential. It begins to imagine signing its own agreement (Garrett, 2014).

The DoJ has an interest in avoiding the devastating effects of a judicial defeat that endangers the foundations of the sustainability of the accusations based on the FCPA which denies the solidity of the legislative instrument itself as a perception of the outside where the negotiation takes the lead of elements of fact and law which in the investigative phase will have to induce the agency and close the case without taking any legal action. The dispute is solid and the parties begin to discuss the beliefs of an agreement (Tarun, Tomczak, 2018).

The agency avoids exposing the basis of its policies on matters in conflict with violations of the FCPA such as a clear perception of the vulnerability of application practice. This means that the multinational has an interest in avoiding the process that leads to a serious conviction in terms of economic sanctions and reputational damage even talking about fraud that the multinational tries to conclude and has a lower negative impact on shareholders, business partners, creditors and the market in general than respecting a multinational that is convicted of fraud (Kim, 2020; Koehler, 2020).

These agreements have a jurisdictional passage that provides for

the review of the judge which appears limited to a control that does not circumvent the time limits that are provided for by the Speedy Trial Act²⁸⁰, i.e. the agreement that prevented the accused from proving his innocence and contained illegal and unethical terms (Tarun, Tomczak, 2018)²⁸¹.

The Deferred Prosecution Agreement (DPA)

Criminal justice that is based on a negotiated agreement in the American context proves to be an alternative that has two hypotheses that are foreseen in the case of corruption investigation, namely the indictment (indictment) and the dismissal (declination)²⁸².

It is a vision that conceives the solution of eliminating the negative externalities that each of the traditional options entails. Incrimination destabilizes the company by jeopardizing the fact that the authors of the illicit conduct and the entire community of

²⁸⁰18 U.S.C. § 3161.

²⁸¹See the case: U.S. v. Fokker Servs. B.V., 818 F.3d 733, 738 (D.C. Cir. 2016).

²⁸²DOJ, SEC, U.S. Attorney's Manual 2008 (Justice Manual), Title 9.Criminal, § 9-28.200 General Considerations of Corporate Liability, p. 1.: <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>

stakeholders, i.e. all subjects such as customers, collaborators, creditors, employees, suppliers, have an interest in continuing the commercial activity carried out by the legal person. Archiving allows the impunity of perpetrators of an offense which risks undermining the preventive function of the criminal law adheres to lawful behavior (Koehler, 2018b).

The alternative resolution tools in corruption cases avoid externalities which bring the benefit of following a path where the company adheres to behavioral models and criteria of ethics and lawfulness.

The Deferred Prosecution Agreement (DPA) and the Non-Prosecution Agreement (NPA) are used for the resolution of minor, modest crimes (Scollo, Winkler, 2017) finding an application in cases of violation of the FCPA and becoming a de facto alternative where the rule creates the reasonable expectation of resolving proceedings that have to do with the signing of the agreement (Greenblum, 2005; Koehler, 2018a; Koehler, 2020)²⁸³.

The DPA stands out due to the following characteristics: “(...)

²⁸³Koehler affirms that: “(...) the risk that adhesion to these instruments occurs regardless of the validity of the accusations made against the multinational enterprise under investigation, and that rather it results in a mere calculation of risk aversion, valorising the private interest in negotiation, rather than the public one to the administration of justice (...)”.

involves the suspension of the proceedings and the deferral of a possible indictment; -is subject to filing in the district court (...)” (Woody, 2018).

Negotiating the conditions for signing a DPA means paving the way for signing your own contract as a structure that has a predetermined nature and which includes the identification of the subjects, establishing the conditions and the object of the agreement. In particular, the DPA subscribes the following elements to the DoJ: “(...) -the identification of the contracting parties in the DoJ and in the suspected company; -the exposition of the facts that constitute the premises of the agreement and on which the contractor signs an acknowledgment of responsibility; -the list of circumstances that affect the content of the agreement, i.e. the collaboration with the DoJ and the current state of the internal compliance procedures; -the object of the agreement, i.e. the suspension of the proceedings and the deferral of the indictment of the company under investigation, in exchange for which the company generally undertakes to pay a financial penalty; -observe and fulfill the additional contractual conditions negotiated and agreed with the DoJ; -the analytical exposition of the conditions under which the DoJ agrees to sign the DPA, (...) the obligations assumed by the company regarding the adaptation of the “compliance programs” (...) the parties, in this regard,

agree to set a deadline necessary for the company to fulfill the obligations assumed with the agreement, both with regard to the payment of sanctions and with regard to the adaptation of the internal control systems. The term is generally set for a period of between two and four years, and can possibly be extended. The observance and correct fulfillment of the obligations, at the end of the established period, entails the definitive closure of the proceedings without criminal charges (...)” (Koehler, 2018b).

A third element which consists in the filing with the competent district court has a formal fulfillment and does not allow the judge full scrutiny. This aspect constitutes one of the major aspects of criticism in the regulation of agreements which by majority escape judicial control and give rise to the phenomenon of negotiated justice where the need to neutralize it is possible to risk and prevail over violations of the FCPA (Tarun, Tomczak, 2018; Koehler, 2018a).

The Non-Prosecution Agreement (NPA)

Another important tool for resolving a matter dealing with international corruption as an alternative to instituting a trial is the NPA (Senn, Sokeny, Luk, Bernstein, 2013; Sokeny, 2017; Woody, 2018).

The NPA takes the structure of the DPA. It differs in a formal and unique way in the negotiated contents which take shape in the contractual clauses as seen in the paragraphs of the letter agreement, i.e. the letter of the DoJ which the multinational is signed for acceptance (Scollo, 2019).

The NPA, unlike the DPA, determines the dismissal of the proceedings and the waiver of criminal charges against the multinational which is under control and evaluation. The main element is the NPA which respects the negotiated resolution tools in international corruption cases (Zhang, 2020; Koehler, 2020).

Maximum collaboration has fulfilled the improvement of internal control procedures and/or fulfillment is in the advanced or final stage (Spalding, 2017). The NPA involves a judgment that is favorable to the success of the inputs that are contained in the agreement that is chosen (Scollo, 2019). Another element is that there is a lack of judicial scrutiny. The NPA is not filed with the court and in such a way a real private agreement is resolved (Makinwa, 2013; Koehler, 2020).

The characteristics of the NPA distinguish this instrument of the DPA in the following aspects: “(...) -the epistolary form; -the immediate settlement of the proceedings without any incrimination; -the absence of filing in court and ratification by the judge (...)” (Koehler, 2020).

The Guilty Plea Agreement (GPA)

The Guilty Plea Agreement (GPA) is yet another resolution tool in international corruption cases which establishes the process as used by the DoJ and in settling corruption cases where solid evidence demonstrates that financial penalties are high and which have defined with the GPA.

This is a type of plea bargaining where the judge is asked to decide according to the conditions established by the parties.

The DoJ and the multinational sanction a full recognition of the alleged conduct where the GPA leads to a guilty verdict. Thus a series of obligations are established as in the cases of the DPA and the NPA where multinationals determine the extent of the sanctions. The judge does not carry out a scrutiny that is agreed upon by the parties and limits himself to a mere ratification of the agreed conditions as an instrument that presents the characteristics of negotiated justice. Some important aspects are concentrated on the GPA: “(...) -the form of plea bargaining; -the immediate definition of the procedure with the affirmation of the responsibility of the multinational company; -the ratification of the negotiated conditions by the judge (...)” (Koehler, 2020).

These are tools that are considered in a unitary manner to the DoJ

and SEC sanctioning system which defines cases of violation of the FCPA according to the order of severity and the comparison of the peculiar characteristics that they bring from their nature.

The choice of the negotiating tool is anticipated and takes place based on the circumstances of a concrete case that has a specific impact where the negotiation between the parties and the legal representatives have a solid position in society in terms of arguments that respect the accusations in terms of systems of compliance as a negotiating power of legal participants to get the best deal they want.

The “Declination Letter” (DL) and the “Declination with Disgorgement” (DLD)

Over the years in the sector of negotiated resolutions concerning corruption cases as we have seen in the DPA, NPA and the GPA an alternative solution has emerged for starting the process of a real dispute which has to do with criminal action against of a multinational like the Declination Letter (DL) (Woody, 2018)²⁸⁴.

²⁸⁴Woody affirms that: “(...) the recent emergence of the phenomenon is due to the launch, in 2016, of the “Pilot program” under which companies that self-report the discovery of violations of the FCPA collaborate effectively with the agency and implement all remedies necessary to prevent the perpetration of new violations, obtain preferential treatment, concerning the

As in the case of the NPA, it is not a real contract but a letter that was sent to the DoJ to the relevant suspect company. This letter took note of the circumstances of the case where the authority chose not to initiate actions which are considered to close the investigation. The following factors play an important role: “(...) -the nature and severity of the illicit conduct; -the degree of pervasiveness within society; -the existence of previous violations of a similar nature; -the willingness to cooperate with the authorities; -the presence of pre-existing compliance procedures; -the timeliness and voluntary nature of the self-report; -the remedies implemented, including the replacement of responsible parties, the repayment of undue payments; -the possibility of avoiding collateral damage that would result from the indictment; -the adequacy of remedies other than criminal action; -the superfluity of the action against the legal person, given the adequacy of the incrimination of the natural persons involved (...)” (Woody, 2018).

Another variant is the Declination Letter with Disgorgement (DLD) where together with the archiving the authority can obtain a payment for an amount which returns the related illicit profit.

We can say that this instrument accepts criticism on a theoretical point and involves the mixing of criminal and civil law

dismissal of the charges (...)”.

institutions. Discretionary dismissal through the DL is a waiver decision that respects criminal prosecution. The disgorgement and the DLD is not a civil penalty that has a punitive nature that is associated with criminal waiver. It is an upwardly mobile institution. In particular, since 2016 and after the DoJ has used this type of tool in 14 cases and in 7 has obtained the payment of a sum equivalent to the profit of the crime where 50% of the cases concerned the DLD²⁸⁵.

²⁸⁵See the case: In re: Nortek, Inc. (3 June 2016); In re: Akamai Technologies, Inc. (6 June 2016); In re: Johnson Controls, Inc. (21 June 2016); In re: HMT LLC (29 September 2016); In re: NCH Corporation (29 September 2016); In re: Linde North America Inc. (16 June 2017); In re: CDM Smith, Inc. (21 June 2017); In re: Dun & Bradstreet Corporation (23 April 2018); In re: Guralp Systems Limited (20 August 2018); In re: Insurance Corporation of Barbados Limited (23 August 2018); In re: Polycom Inc. (20 December 2018); In re: Cognizant Technology Solutions Corporation (13 February 2019); In re: Quad/Graphics Inc. (19 September 2019); In re: World Acceptance Corporation (5 August 2020); In re: Corsa Coal Corporation (03 August 2023); In re: Safran S.A (21 December 2022); In re: Jardine Lloyd Thompson Group Holdings Ltd (22 March 2022); In re: World Acceptance Corporation (08 May 2020); In re: Quad/Graphics Inc (19 September 2019); In re: Cognizant Technology Solutions Corporation (13 February 2019); In re: Polycom Inc. (20 December 2018).

SEC settlement: The “Cease-and-Desist Order” (CDO) and the “Consent Agreement” (CA)

Already since 2010 the SEC has been talking about the new course of monitoring of violations of the FCPA which included the DPAs and the NPAs as its own sanctioning system similar to that of the DoJ (Koehler, 2020).

Tools that have not found full application within the framework of the SEC, thus observing a preference of the agency towards procedures that are administrative in nature²⁸⁶. Already since 2010, according to the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the extension of the possibility of imposing civil penalties through administrative proceedings leading to the adoption of a Cease-and-Desist Order has been noted. (CDO) (Hansberry, 2012; Mathis, 2016; Huff, 2016; Koehler, 2018a).

This is a provision that is devoid of judicial control as for example the NPA in the position of the SEC which results in assuming the regulatory and guarantee functions when it assumes the role of public prosecutor, judge and/or jury as well as the entire procedure which takes place within the agency. In civil court the argument is resolved with the adoption of a Consent

²⁸⁶“Types of SEC Resolutions”, collected by the Stanford Law School’s Foreign Corrupt Practices Act Report Clearinghouse.

Agreement (CA) which is in relation with the judge who is called upon to ratify the agreement between the parties. The poor application of the DPA and of the NPA that the SEC has accumulated instruments that are not identical to the DoJ but lead to the same result i.e. negotiated justice with the same characteristics that highlight the instruments at the DoJ i.e. after contracts that reach an agreement and which exclude the trial, i.e. the judicial review.

It is a system that feeds itself and favors disclosure that rewards collaboration that sanctions corruption in a lasting way. It promotes behaviors that have a virtuous nature and which pass through contractual obligations which are undertaken with agreements that effectively adopt internal procedures of compliance.

Contents of the agreements

As we have predicted, the resolution of international corruption cases through negotiated appeals has quickly become a consolidated phenomenon over the years. This is not an option that is an alternative to the recurring practice. The formal structure of the agreements varies depending on the type of agreement that has been chosen by the parties such as a letter in

the case of the NPA and a contract in the case of the DPA, a plea agreement in the case of the GPA. Substantial consensus of circumstances and obligations turn out to be common.

It is identifiable that the conditions relate to a preliminary phase to the signing of an agreement. They refer to the collaboration of a company that has been discovered and the ascertainment of illicit facts by subjects who have carried them out (Scollo, 2017). A list of compliance measures is identifiable that the company undertakes to implement in order to prevent the recurrence of crimes. A number of clauses of a contingent nature concern particular circumstances in the specific case such as a relationship with other American or foreign authorities. The catalog of conditions concerns relations with the contracting authority after the signing of the agreement.

Preliminary cooperation with the authority

The clauses that are included in the settlement agreements in cases of corruption concern the behavior of the company until the signing of the relevant and final settlement.

(Follows): The voluntary disclosure

The first element in the signing of an agreement is the voluntary anti-reporting of an offense that is carried out by the company and that the authority formulates some complaints and/or has started the relevant investigation. The system thus tends to reward legal entities that expose the relevant offenses that may be committed in the activity of a company before the object of the investigation is part of the DoJ and the SEC. The role of the voluntary disclosure clause within the agreements is that virtuously recognizes the multinational by attributing credits that contribute to reducing the sanction that is imposed in the specific case (Eser, Heine, Huber, 1999).

(Follows): The cooperation clause

The cooperation clause is the second element that is part of the signing of an agreement that puts a multinational towards ascertaining the facts that are accused of it. The American authority positively evaluates every contribution that helps to explain any type of aspect that is investigated, thus providing documents with full access and to every part of the agreement as an element of evidence. Independent tests and activities are part of an investigation where the results are made available to

investigators. The main difficulties in investigating international corruption include evidence in American jurisdictions that are uncooperative. This attitude shows that it contributes to consolidating and ascertaining illicit facts in a positive way by the authority in terms of sanctions, in the choice and type of agreement they must sign.

(Follows): The snitch clause

The relevant collaboration that was requested to overcome the facts under analysis also extends to facts that are not discovered and to the identification of the relevant subjects, i.e. natural persons who are responsible for crimes committed. In the preliminary phase of signing the agreement, a request for full cooperation is requested which is addressed to the multinational that has been investigated. The relevant request presupposes active behavior by a legal person and not mere support in the agency's investigation. With this request, the company becomes a whistleblower (Deen Westbrook, 2018; Kreiner Ramirez, 2020; DeMott, 2021) and is responsible for its employees. It is called this way to reveal the violations of the FCPA which he is certainly aware of as well as to all the subjects who are involved. This is one of its own informant activities that the multinational

follows to reduce the sanctioning consequences.

Remedies for adapting the organizational model

The remedies that are included for the multinational undertake to adopt some areas of interest which are the following: “(...) - the composition of the staff, both with regard to top positions and subordinates; -decision-making procedures; -compliance procedures; -the supervisory bodies (...)” (Kang, 2023).

We can talk about an ad hoc obligation that the multinational assumes towards an American authority and its compliance determines the resolution of an agreement that allows formal indictment. The clauses regarding remedies constitute a central basis of greater interest in negotiated justice and which provide the multinational with a decalogue of measures which adequately adopt its own internal protocols and are likely to have varied and broad value in the matter of compliance which is the prevention shared by the American authorities.

Compulsory leave for those involved

As is logical, the first step when international corruption is discovered is the replacement and dismissal of the people who

are involved in such types of attitudes.

Signing the agreement entails a specific obligation in the company that replaces managers and individuals in top positions who are involved in a corrupt moment as the subject of investigation. The same thing also applies to employees and collaborators of the company's knowledge assets who are equally involved. The objective is the cleanliness and effectiveness of the people involved in the related crimes. It may be that the multinational formally exits the illicit activities covered by the agreement and that considers illegal behavior to be an attitude that leads to expulsion from a company. The absence of a judicial scrutiny is based on few accusations where the traceability to the subjects, even having a presumed nature, involves and entails the risk of paying the costs for the organisation's offence, subjects who lack substantial margins of defence.

Persons in top positions are removed from the administration if the employees do not hold top positions and have sufficient means to adequately contest the unfoundedness of the conditions for their dismissal.

The clause does not require the selection of the subjects involved to take place through a prior experiment of internal investigations and ensuring the possibility of demonstrating their non-involvement in the accusations. This clause responds to needs of

image and not of justice, thus ensuring the possibility of demonstrating the non-involvement of the accusations as well as of the main subjects who cause damage and who did not take part in the whole matter of corruption.

Improvement of decision-making procedures

The total framework of measures that concern the adaptation of decision-making procedures are high standards of an ethical and control nature that seek to prevent internal compliance procedures (Sivachenko, 2013). The object of the multinationals' obligations concern: “(...) - the expansion of the scope of decisions for whose approval a resolution of the administrative body is necessary, which therefore bears a greater commitment in the prevention of payments of an illicit nature (control of vertex); - the limitation of individual decision-making powers and the expansion of joint procedures that provide for a double passage for the most relevant decisions, which involves at least one top person from a different company function, so as to increase the level of control (cross-control) (...)” (Sivachhenko, 2013; Kang, 2023).

Improvement of compliance procedures

The total framework of measures that have to do with internal compliance procedures requires some elements for a multinational such as: “(...) - implement its own protocols and provide, if necessary, for an internal reorganization, in so as to ensure that the functions of purchasing goods and services are centralized, and that in-depth due diligence is carried out on the subject of the contracts and the nature of the contractors, even after their conclusion; -base directives, procedures and internal controls on criteria of correctness and guarantee effective and in-depth accounting control over corporate operations, in order to prevent, investigate and discourage illicit conduct; -prepare internal systems that prevent interference by public officials in personnel selection procedures and the procurement of goods and services; -establish or strengthen anti-corruption training activities at all levels of staff, including top management positions, and especially for those with purchasing responsibilities and spending powers (...)” (Kang, 2023).

Thus the compliance procedures have the objective of establishing preventive measures for the perpetration of international corruption conduct. The illicit conduct that occurs is as a result effective and the risk shows similar (Cassin, 2009; Cassin, 2014; Hofman, 2014; Koehler, 2014a; Hough, 2017).

Creation or implementation of control bodies

Another total framework of measures that has to do with the creation of bodies that verify the established procedures are correctly observed and no deviations and behaviors of an illicit nature have occurred (O'Sullivan, 2016).

The relevant clauses that concern this type of nature to a multinational are: “(...) -separate and make the compliance function independent, creating a special department whose members cannot be dismissed without the favorable vote of the administrative body, and of those who represent the minority shareholders within this body; -create a committee, within the compliance department, which has the task of verifying and contesting any violations by employees, with powers of suspension and removal from functions in the event of a violation; -create an internal committee with authority over investments, in which the compliance department participates; -create a committee responsible for internal investigation activities, with procedures that ensure the functioning and confidentiality of “whistleblowing”; -create an ethics committee with the task of implementing and promoting codes of ethics and conduct (...)” (McCallister, 2017; O'Sullivan, 2018; Boles,

Eisenstadt, Pacella, 2020).

Any clauses

The use of negotiated justice involves the inclusion of conditions found within an agreement signed by the multinational. We can talk about agreements that are concluded by the DoJ and the SEC where reference is made to the behavior of the company which is suspected to be concomitant with the subscriptions.

Take responsibility

The conclusion of negotiated resolution agreements implies the recognition of the company's responsibility in the illicit facts which are indicated as an introductory part of the agreement. This path is followed in the NPA and in the DPA. An aspect that is present in the signing of the GPA where the stigmatization of guilt is reached. Settlements with the SEC allow for settlements that include an admission or denial of liability. It should be underlined that the signing of a settlement is refused if the multinational does not expressly and/or implicitly want to recognize its responsibility and contest the related accusations (Koehler, 2018b).

(Follows): Criminal history of the suspected multinational

Violations of the FCPA involve patterns of conduct that are recurring. These agreements sanction the multiplicity of corrupt practices that are committed abroad in multinationals where corruption is linked to the lack of internal procedures that are adequate for the failure to share ethical principles in the conduct of business. Past violations have relevance that determines the conditions contained in the agreements. The criminal history of a multinational which is suspected of worsening contractual conditions indicates that these are not episodic facts but a structural problem.

Parallel agreements and their stipulation

Violations of the boundaries of the FCPA are numerous for corrupt practices. Within the perimeter that traces the legislative instrument, please refer to the existence of agreements for public authorities with private entities and for foreign governments (Frick, 2013). These are aspects that include precise clauses in the agreements with the DoJ and SEC and which contribute to determining the overall structure of a negotiation which includes:

“(...) -the parallel resolution of disputes with the victims of illicit conduct (e.g. the composition of a class actions); -the stipulation of a parallel agreement alternatively with the DoJ or the SEC; - the stipulation of a parallel agreement with the authorities of the country in which the corrupt conduct occurred, or with the country in which the sanctioned foreign multinational has its headquarters (...)” (Kang, 2023).

This aspect is interesting and deserves to be investigated given that the American authorities have recognized the foreign multinational to be sanctioned under the FCPA with a credit that corresponds to the agreed sanction that the company chooses to apply where it has paid the relevant amount to the country of provenance and to verify the facts²⁸⁷. This is an option as an alternative that respects the two proposed based on continuing the legal transplant as a conventional model or on the American model. The new enforcement practice of federal agencies is limited to the cooperation of an investigative phase to benefit from it in the sanctions phase (Steward, 2012).

²⁸⁷See the case: Odebrecht, in Plea Agreement, U.S. v. Odebrecht S.A., §21-d., p. 18. The case: Airbus, in Deferred Prosecution Agreement, U.S. v. Airbus SE (Airbus), No. 1:20-cr-00021-TFH (U.S.D.C. Jan. 31, 2020), §8, p. 13.

Future cooperation as a mandatory model

The obligation of cooperation and collaboration after the signing of an agreement is part of specific obligations that impose the continuation of cooperation of the multinational with the American authorities and the task of disclosing any other past, present or future corrupt facts where the company has knowledge. This obligation includes the element of a particular interest which is part not only of the commercial activity carried out by a company but also concerns its employees, collaborators, administrators, suppliers, customers, commercial partners and competitors. This is an obligation that ends up weighing on the workers, where the company asks for collaboration with the authorities. Thus they end up finding each other and exposing all the facts that they know and which risk turning into sources of evidence and suspects. If you do not cooperate, you risk being disciplined and/or fired (Huskins, 2008; Yockey, 2012).

This is a clause that constitutes a specific attention in a peculiar way. This transforms the company that sanctions a source of knowledge of other types of violations within the framework of multinationals and an obligation to reveal their misdeeds but also takes on the appearance of the DoJ which reports on every possible violation. The multinational puts this clause to be pervasive as it extends to American authorities and is not placed

in the eyes of the DoJ that may follow violations of the FCPA.

The “final” conditions

The last part of the agreements of the DoJ and the SEC sets the conditions that are stringent with the multinational being stringent to accept and without reservations to access the resolution in the case of avoiding indictments that are sued.

These conditions result in the American authorities renouncing the continuation of proceedings. This waiver is temporary and subject to a termination condition in the cases of the NPA and GPA. The multinational agrees to pay financial penalty to have civil and criminal nature and which returns the profit to correspond to the accrued interest. A series of further waivers concern the exercise of constitutional rights as we see in the following paragraphs.

Waiver of charges and judicial scrutiny

Signing up to a DoJ and SEC agreement results in a self-imposed waiver of the right to contest charges that one is not guilty before judicial authorities (Smith, 2013). By accepting the agreement, the multinational thus renounces contesting the facts that are

attached to the authority of the public sphere such as for example in the interviews of its employees, in corporate communications to shareholders, to the press and to the market. The company renounces being subjected to a judgment by a jury which results in the verification of the inconsistency of the accusations at a speedy trial. The agreement involves the definitive renunciation of an innocent person²⁸⁸.

The waiver to contest charges is a system that includes the results of a thoughtful decision. Thus the practice of agreements risks transforming criminal legislation in the field of corruption into a tax imposition. This risk includes obligations to improve internal compliance procedures or control bodies. The control function shifts towards a sanctioning profile from the perspective of general prevention.

The absence of a judicial scrutiny excludes the possibility of accessing a jurisdictional interpretation of the provisions that are the subject of the analysis of our investigation and leaves other choices to the interpreter to adapt to the enforcement policies of the DoJ and the SEC. The absence of jurisdictional control does

²⁸⁸See the case: Odebrecht, in Plea Agreement, U.S. v. Odebrecht S.A., *op. cit.*, §17-a., p. 13; See the case: Petrobras, in Non-Prosecution Agreement, U.S. v. Petróleo Brasileiro S.A. (Petrobras), (U.S.D.J. filed Sept. 26, 2018), §3, p. 3; See the case: Avon, in Deferred Prosecution Agreement, U.S. v. Avon Products, Inc., No.1:14-cr-00828-GBD (S.D.N.Y., Dec. 17, 2014).

not allow a natural, legal or foreign person to review the jurisdiction and extra-territorial application of the FCPA which we have reported in the previous paragraphs (Koehler, 2018a)²⁸⁹.

Waiver and prescription

Corruption schemes occur after years of compliance and verification of illicit payments. A condition accesses the agreement where the multinational renounces and expresses objections to the limitations of the facts that emerged from investigations²⁹⁰. The multinational accepts that the suspension of the statute of limitations for the entire duration of the agreement preserves intact the possibility of prosecuting the multinational involved and in the event of failure to provide the relevant resolution for the facts that are not yet prescribed²⁹¹.

²⁸⁹Koehler affirms that: “(...) wonders why foreign multinationals, which have huge economic resources, sufficient to bear the costs of a firm opposition to a practice that appears dubious, prefer instead to sign such agreements, without objecting to the illegitimacy of the jurisdictional and extra-judicial approach territory of federal agencies (...)”.

²⁹⁰See the case: Alstom, in Information, U.S. v. Alstom S.A., Cr. No. 3:14-cr-00246-JBA (D.C.C. Dec., 22, 2014), §57, p. 20; Plea Agreement, U.S. v. Alstom S.A., Cr. No. 3:14-cr-00246-JBA (D.C.C. Dec., 22, 2014), §57, p. B-20.

²⁹¹See the case: Petrobras, in Non-Prosecution Agreement, U.S. v. Petróleo

Waiver of unusability exceptions

By joining an agreement, a multinational company, according to the American authority, renounces the objection of the unusability of the documents collected during the investigations which are provided in the same company through its own collaboration. Waiving procedural effectiveness is part of a waiver where the hypothesis of an agreement had to be resolved and the authority carries out criminal or civil action in court. The multinational refuses to object to the unusability of the relevant evidence which is collected in a timely manner²⁹².

Waiver of challenge to the agreement

The agreement is not binding on the federal authorities but only on the private parties who sign it²⁹³. The multinational undertakes not to contest the agreement and to appeal in the case of GPA²⁹⁴.

Brasileiro S.A. (Petrobras), op. cit., § 11, p. 7.

²⁹²See the case: Avon, in Deferred Prosecution Agreement, U.S. v. Avon Products, Inc., op. cit., §2, p. 2.

²⁹³See the case: Petrobras, in Non-Prosecution Agreement, U.S. v. Petróleo Brasileiro S.A. (Petrobras), op. cit., § 16, p. 9.

²⁹⁴See the case: Odebrecht, in Plea Agreement, U.S. v. Odebrecht S.A., op.

Waiver of confidentiality

The confidentiality agreement is agreed between the parties to a transaction in whole or in part according to the content of the transaction. The tools of the negotiation resolution in cases of international corruption include the DoJ and SEC, the possibility that is granted to private parties where the authority reserves the right to disseminate the relevant content of the agreement also in its entirety of communication if it also concerns other authorities, i.e. foreign where the content of the agreement and the investigative measures justify the same²⁹⁵.

Waiver and refund of tax benefits

The conclusion of an agreement also has as its basis the provision for a multinational of a relative waiver of any claim for reimbursement and also in the case where the termination of the agreement dates back to non-compliance of the same. It

cit., §17-e., p. 1.

²⁹⁵See the case: Petrobras, in Non-Prosecution Agreement, U.S. v. Petróleo Brasileiro S.A. (Petrobras), op. cit., §§ 16-17, p. 9. See the case: Avon, in Deferred Prosecution Agreement, U.S. v. Avon Products, Inc., op. cit., §8, p. 8.

renounces the inference that the importation of payments from the agreement leads to a net benefit deriving from the relevant agreement²⁹⁶.

Termination clause

The criminal and civil action is before the judge which is subordinate and which respects the conditions set out in the agreement. The agreement provides for a term between two and four years which is extended by one year within which the multinational takes care of fulfilling the obligations undersigned, i.e. the matter of replacing the managerial or employee personnel involved in preparing for adequate internal decision-making and compliance and the creation of control bodies.

Evaluating the correct fulfillment means carrying out the end of the expected period. The multinational complies quickly and the authority decides to activate the resolution condition and to cease the suspension with the simultaneous definitive closure of the proceeding²⁹⁷.

²⁹⁶See the case: Petrobras, in Non-Prosecution Agreement, U.S. v. Petróleo Brasileiro S.A. (Petrobras), op. cit., § 9, p. 6; see also the case: Airbus, in Deferred Prosecution Agreement, U.S. v. Airbus SE (Airbus), op. cit., §10, p. 14.

²⁹⁷See the case: Odebrecht, in Plea Agreement, U.S. v. Odebrecht S.A., op.

The object of fulfillment is the exclusive evaluation of the federal authorities which determines that the company respects the conditions agreed upon at the beginning. If this were not the case, the obligations undertaken in relation to compliance and control bodies are not respected. The company which commits violations of the FCPA or other federal crimes has the opportunity to expose the relevant remedies that are adopted or intended to be adopted with the aim of granting an extension thus avoiding the reopening of the proceeding which would otherwise be inevitable²⁹⁸.

The M&A clause. Inheritance liability

The multinational, through dimensional, commercial and industrial development, seeks to find agreements through the DoJ and SEC as a merger. This means that the multinational uses the succession liability clause which is part of the extraordinary operations (Prestidge, 2013). The purpose of the clauses is to prevent corporate transformations from nullifying the action of the federal authority, thus rendering the sanction and improvement of the corporate structure in terms, decision-

cit., §1, p. 1-2.

²⁹⁸See the case: Petrobras, in Non-Prosecution Agreement, U.S. v. Petróleo Brasileiro S.A. (Petrobras), op. cit., § 11, p. 7.

making and compliance procedures. The agreements stipulated by the American agencies include a specific obligation for the private contractor where the extraordinary operations make the business partner to the existence of the agreement and to obtain the assumption of its own, in the company that dates back to the operation, the obligations that are agreed originating from the agreement. The objective is the nullity of the operation²⁹⁹.

This clause has a double risk of corruption in the context of M&A operations. Not only the due diligence activity that deals with the risk of disputes for violations but also in the FCPA. It is taken into account that the risks derive from the agreement as well as the possible consequences of inadequate, omitted management have not been concluded.

The “monitorship” clause

The internal compliance procedures constitute an introduction to the fund of agreements which are fully described. The fulfillment of the contractual obligations are assumed by the multinational enterprise and the signing of the agreements and the purposes of this inadequacy.

²⁹⁹See the case: Odebrecht, in Plea Agreement, U.S. v. Odebrecht S.A., op. cit., §10, p. 8. See the case: Petrobras, in Non-Prosecution Agreement, U.S. v. Petróleo Brasileiro S.A. (Petrobras), op. cit., § 14, p. 8.

The process of adaptation to the standards is the responsibility of the contracting company. The agreements may provide for the appointment of monitors, i.e. commissioners who are appointed by the federal agency and which provides the company with experience, skill and independence with the task of supporting the achievement of the objectives of periodic recommendation reports³⁰⁰. This type of monitor has an information base for the department of any violations that become known and which periodically inform the authority on the progress that the company is following. Activities, information assumed that carry out and that remain confidential, reserved, secret in companies and for industrialists. The monitorship clause is judged negatively because it makes the objectives ineffective. The fulfillment of the contractual obligations is in itself sufficient to guarantee compliance with the agreement, as well as the prospect of a resolution for non-compliance in a decisive way for the multinational that follows the path of fulfillment.

Structural multinationals follow dimensions that are incompatible with one or a few commissioners (Doty, 2007; Koehler, 2020). The coaching activity is useless. The presence of one or more

³⁰⁰See the Odebrecht case, in Plea Agreement, U.S. v. Odebrecht S.A., op. cit., §§30-32, pp. 23-25 and also the “Attachment D”, p. D-1 ss. See the Airbus case, in Deferred Prosecution Agreement, U.S. v. Airbus SE (Airbus), op. cit., Attachment D, p. D-1.

figures who must be experts support the company towards a modern path, i.e. in the compliance functions and in the guarantee bodies which contributes to the success of an agreed program. These are costs where the company continues to incur to purchase this type of expertise on the market. The agreement cannot contribute to the result and seeks to favor this type of solution.

Collaboration v. codification

The American model is based on two main pillars. The codification of criminal cases that do not present application limits to a sanctioning system is based on a successful method where the instruments of justice are negotiated. On this aspect, the application of the FCPA highlights not only a preference for the resolution of cases of international corruption through the use of the agreements referred to above but also in the convenience for the parties involved to proceed according to these terms. In the useful calculation between the options in play, the multinational does not have to gain from a conflict with the American authority, thus mitigating the effects of any who manage the issues through the use of negotiated justice. The effects of non-cooperation are worse with regards to sanctions as

a full adherence to a program that seeks to rehabilitate the federal authorities to constitute a solution in an efficient manner.

Effects of collaboration

It is interesting to note that the multinational arrives at elements of guilt where the violations of the FCPA contest the charges of the DoJ and the SEC. The apparatus that arranges its authorities is stringent and expresses the multinational's prospect of having to pay economic sanctions and facing a costly trial (Fraser, 2016). The choice of non-cooperation with the DoJ and the SEC brings various types of prejudices and collateral consequences which are also burdensome for the financial penalty itself.

Increase in the amount of sanctions

Due to the lack of collaboration, an initial result is the increase in sanctions imposed. Through the Guidelines system, the multinational reaches allegations of international corruption which raises objections to procedural or substantive issues without contesting the merit of the accusations and which is

characterized as non-collaborative and precluded from accessing benefits. A tightening of the sanction imposed is a term of the procedure where the company has an economic interest regarding the collaboration given that the opportunity to reduce the financial risks arising from the investigation is a calculable reality (Koehler, 2018a)³⁰¹.

Towards criminal proceedings

An initial collaboration at the beginning leads to the investigation of a rapid consolidation of the allegations of a formal indictment. Two consequences proceed here. The lack of initial collaboration excludes the company from an agreement in the form and conditions that are less rigid. Collaboration is one of the main elements that influence the choice of the type of agreement which excludes the use of the more stringent path of the GPA. Persistence of non-cooperation leads to the establishment of criminal proceedings. There are few cases where an investigation does not lead to the ascertainment of violations of the FCPA for which the company faces criminal charges, a costly trial, an uncertain outcome and stringent sanctions in the event of conviction. Economy of the options seems to offer a

³⁰¹U.S. Sentence Guidelines, §8C2.5(g).

multinational a compromise that is demonstrated by the facts themselves. The factual premises are greater and the competitive advantage is a possibility to avoid the related ongoing judgment.

Damage to reputation

Behavior of the kind described in the previous paragraphs shows a multinational that does not cooperate and thus ends up on trial, suffering incalculable damage to its reputation (Kim, 2020). The determination of liability is the subject of a judgment before the court, a judgment of the investors of an immediate nature. After the news of an indictment and even just the minimum of investigations having to do with violations of the FCPA the concern that investment decisions in the stock market are thus influenced (Columbic, Adams, 2011; Bacio Terracino, 2012; Aye, 2013; Keeling, Adams, Lupton, 2014; Manning, 2015; Attila, 2016; Koehler, 2018b). The multinational finds itself in the sights of everyone as well as the DoJ and the SEC and above all the company's decision not to collaborate with the appropriate authorities causes damage to the entity in a more significant way for the authorities but also for the company itself.

Interdictory measures

Violating provisions of the FCPA means for a multinational company the opening of investigations as well as the decision for suspension, prohibition from contracting with the public administration (DOJ, SEC, 2020). Suspending in any way and imposing measures means mere incrimination that is not necessary to wait for a definitive conviction. The multinational's choice not to collaborate inevitably leads to the exclusion of contracts with the federal government. The decision is taken by each part of the government, taking into consideration numerous factors such as the interlocution and opinion of the DoJ. Refusing to collaborate does not allow the multinational to count on a favorable opinion from the DoJ, prejudging that the fate of the government assessment is questionable. A negative opinion from the DoJ and SEC entails the exclusion from any relationship with international institutions such as the World Bank, the European Bank for Reconstruction and Development and other multilateral banks that have adopted a common anti-corruption policy since 2010. Violation of the FCPA entails negative consequences in the regulatory sector as in the weapons sector which requires special export licenses. The federal authorities play an important role. International corruption conduct is sanctioned through the use of justice negotiated by the DoJ to the SEC which provides on the

suitability of measures that are adopted to sanction, avoiding such conduct from the application of disqualification measures.

Effects of collaboration

One of the main effects of an international corruption conduct that becomes aware of the illicit conduct committed during the exercise is the silence of taking advantage of the profits of corruption. The sources of information of investigative interest in the American system are multiple, so it is possible that internal subjects of the companies and/or competing operators proceed with information from the authorities to obtain the relevant benefits with the prejudice of the accusation. The general convenience of voluntary disclosure fuels the system of control over activities that commit crimes against multinationals. Even if self-reporting does not exist, the company continues to have a concrete interest in providing maximum collaboration with the federal authority³⁰².

³⁰²U.S. Sentence Guidelines, op. cit., §8C2.5(g).

Lack of formal indictment for corruption

Resolution of a case through an appeal to an agreement presupposes the collaboration for the federal authority to allow a multinational enterprise to avoid enormous damage to its reputation and capitalization that derive from a formal indictment (Kim, 2020).

The cooperation is not part of a mere economic calculation based on the risk of the company but of the consequences that are devastating to the news of an investigation and the indictment that cause the stock market and which can consist in the collapse of the value of the company's shares. Multinationals manage the news of the start of an investigation by transforming them into a concluded agreement, avoiding unpredictable developments in the same (Koehler, 2018a).

The opening of an investigation without an answer for a company is a kind of lack of collaboration with the authority which costs less to the entity and in terms of economic and personal resources using the management of the dispute and in terms of increasing the rates of credit and in terms of economic value in extraordinary M&A operations. The objective of avoiding these consequences are negative. This gives back to the market the image of a company that discovers misdeeds and excludes those involved, improving procedures in order to avoid

new violations and problems without exposing the company and the incalculable risks that compliance with each legal category that is based on the unfoundedness of the facts and its relevance under the FCPA is prevalent (Koehler, 2018b).

Favorable opinion and removal from interdictory measures

Conviction for violations of the FCPA after indictment leads to suspension of federal government contracts and a general ban on government contracting (DOJ, SEC, 2020). Cooperation with the authorities also involves the release of an opinion that is favorable to the departments that are called upon to decide on disqualification measures such as the DoJ and the SEC which attest to the multinational's commitment to setting up compliance systems that avoid the repetition of crimes³⁰³.

Final considerations

The concentration of the US in the sector of combating international corruption takes on an important role through the adoption of effective provisions, limiting the use of a sanctioning model which, through the path we have followed so far, we can

³⁰³U.S. Sentence Guidelines, op. cit., §8C2.5(g).

characterize as severe, rewarding and negotiating.

This is an effective American model with various shades of losses that has greatly influenced the domestic legislator. The criminal case of elements, the form of conduct, the quality of the agent and the extra-territorial application are elements that through a high enforcement of the FCPA occur in the DoJ and of the SEC to conducts that subjects such discipline of companies that have traded securities. The effectiveness of the American system is based on the choice not to split the case and to include facts that are related to the active conduct of the corrupter and without requiring that the illicit payment has an effect expected from the agreement of the constituent elements, i.e. the elements that have subjective nature. In particular, the case of intermediaries effectively punishes donations to third parties, to factual elements who have the task of purchasing the relevant deed and the function of the foreign public agent. Elements that constitute a model towards the management of international corruption, demonstrating the difficulty of applying these elements. A conventional model which is preferable and which incorporates the reasons for success of the American case into the domestic system.

The choice to place the accounting records alongside the specific case of the matter with a control system, independent in the main

case and with high-level sanctions, has an even greater general and preventive capacity. The federal authority did not have sufficient elements to be able to proceed with the formulation of an accusation of international corruption and prevented it from implementing provisions regarding correct drafting regarding accounting control. Reforms and/or comparisons with global and/or European domestic legislation are not the object of our investigation despite the fact that the American model constitutes a valid preference of choice.

In particular, the US has filled the void that has been left by other countries at a global and European level by being interested and able to sanction international corruption. The counteraction of the American system, as a conduct that is outside its territorial borders, does not encounter opposition of a persuasive nature, capable of having dignity to a solid legal basis in the foundations of the FCPA which justifies its extraterritorial application. Foreign multinationals with jurisdiction of origin share the criminalization choices for international corruption. The violation of the FCPA does not substantiate the conduct that it allows as a rule of international law. Within this context, impunity due to the inaction of the countries of origin makes FCPA to provide a remedy.

The process of criminalizing international corruption does not

allow the initial objective to be achieved, i.e. to create a regulatory response to combat the phenomenon by all the states involved in the legal transplant. The US gave the initiative above all to the foreign countries that participated and made it possible to establish in an essential way the affirmation of the American system as a model of supremacy and not a model to be emulated of a pervasive effectiveness that is difficult to oppose. The FCPA has demonstrated a concrete ability to identify and sanction international corruption, perpetrated in multinationals that are superior to other foreign legislative instruments.

The incriminating case is efficient for the reasons we have seen in the previous paragraphs, susceptible to a broad application which is subjective and extraterritorial combining other elements such as the provision of correct keeping of accounting records, a sanctioning system with elements of severity, reward and negotiation which constitute the core of the reasons for the success of the FCPA from the general perspective of enforcement.

Thus it is understood that foreign multinationals are relative to foreign countries provisions (Yockey, 2013). The increase in the actions and sanctions that respect and impose for illicit conduct of this type and the indisputable attention of the DoJ and of the SEC that it directs to foreign multinational enterprises are part of

the FCPA and the global application among the sources of risk where foreign companies are called upon to compete as a government weapon for the world economy.

The FCPA is a unique, universal model that seeks to capture, sanction and prevent international corruption. A model that stimulates the voluntary disclosure of illicit conduct that multinationals engage in and are aware of. A model that rewards the choice to collaborate effectively with the authority to remove the consequences of the offence, to ascertain the facts and to identify the subjects involved. A model that induces the conditions for a showdown of the amounts of the sanction where the adoption of these organizational models prevents the recurrence of these types of crimes.

A model of collaboration and cooperation which reiterates the choice to join the invitation by the American authorities for foreign multinationals which constitutes an obligatory as well as virtuous choice. A point of arrival of the path is the level of enforcement of the provisions that are inspired by conventional models to the progress of the US in the application of the FCPA from negotiation resolution tools in cases of international corruption that are used by DoJ and SEC drawing requirements that are fundamentals of the organisation, control and management model of the foreign multinational, preventing the

corruption of foreign officials and false declarations in the accounting records as well as mitigating the consequences of similar conduct before American justice.

The adoption of compliance decision-making procedures by supervisory bodies that are found among the appellants in the agreements stipulated by the DoJ and the SEC show that companies that are the subject of investigative interest are sanctioned for failure to introduce the undertaking of the same which provides with autonomously and/or through the support of special commissioners (monitors) who are chosen by the authority through a list of candidates provided by the multinational.

It is the same American authorities who have excluded the existence of a global organizational model and the risks of the type of activity of the size and structure of the company so as not to be able to doubt the fact that the adequate obligations of the internal procedures with prevention standards are contained in the agreements of the DoJ and of the SEC that arise from the deficiencies that are identified in the specific investigation. The recurring nature of the obligations does not highlight the implication for the multinational. Call to adapt the requirements of national laws to an enforcement level where the FCPA places enforcement practices.

Another option is the relative acquiescence to the American model in cooperation with the American authorities and the condition of sanctions that lead to monopoly, i.e. the action to combat international corruption. A solution that consciously and unconsciously follows the action to combat the phenomenon of international corruption which stops the adoption of substantive and procedural provisions that allow prosecution through the affirmation of responsibility for natural and legal persons. The ineffectiveness of the regulatory provisions accompanies the auxiliary and supplementary action of the turning point of the American authorities. Acquiescence is not fully acceptable. It believes that the renunciation of elements of sovereignty and international responsibility where the state of origin of the multinational and the country of the conduct occur has the task of encouraging social behaviors that comply with the business system and ethics (Klaw, 2015). Acquiescence to the ineffectiveness of domestic provisions presents profiles of inconsistency where the violation of the prosecution obligations occurs through the signing of the relevant international conventions. Domestic legal systems respect critical profiles that are relevant to the categorical imperative of significantly coherence and the fulfillment of international obligations of a binding nature.

This is an option where the organisational, control and management models are of a high level of compliance standards that are present on the international scene. The provisions of regulations appear to be ineffective and risk leading multinationals towards an underestimation of the risks deriving from international corruption, distancing themselves from the attention of the need to comply with American regulations which are susceptible to global application. The action to combat international corruption by the US is fought severely against foreign multinationals and at least in terms of assets for the sanctioned company and the local community of stakeholders. An option that is less preferable and which ends up leaving the US with the exclusive action to fight against international corruption, thus resulting in the same being used as a weapon in governing the economy (Perkins, 2013; Laidi, 2019).

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international corruption by the US is fought severely against foreign multinationals and at least in terms of assets for the sanctioned company and the local community of stakeholders. An option that is less preferable and which ends up leaving the US with the exclusive action to fight against international corruption, thus resulting the same of being used as a weapon in governing the economy (Perkins, 2013; Laidi, 2019).

Limits to the investigation of international corruption include the difficulty of finding evidence which is frequently found in geographical areas where it is difficult to receive judicial collaboration. Judicial cooperation in the possible application of shared sanctions appears to be the preferable solution when it allows the ascertainment of the facts and the identification of those responsible.

In recent years, especially in the sector of negotiated justice agreements, the logic of sharing sanctions with countries involving corruption has arisen through the instrument of credit where the American authority recognizes that the multinational has financial obligations in the countries of origin and in those most affected by the illicit conduct. This instrument appears sufficiently clear in the sanction by the DoJ where the American authority allows the sanctioned company to avoid the sanctions by demonstrating that it has corresponded to the title of the

sanction to the amount of the foreign country that is interested in the facts that are the subject of the agreement.

This practice allows us to have overcome the domestic approach to the fight against corruption, preserving the US leadership position that it has acquired over the last twenty years. The sum corresponding to the portion of the fine imposed by the American authorities must be determined following the outcome of a domestic proceeding where effective provisions are needed.

Due to the lack of national provisions at an adequate level of enforcement, such a compensatory approach uniquely supports the regulatory apparatus that allows the transposition of foreign decisions with a similar content and/or the execution of negotiation obligations permitted by the foreign authority where the state concerned must be part. In both cases the American system is compatible with the foreign system in question. Otherwise it is difficult to justify on a legal level the payment of sums into the treasury coffers to a country that considers the American model to be contrary to its own system. It is effective to observe that it appears illogical to ask why this model is compatible which has no basis for transposition into the specific legal system and in the face of the considerations expressed in the previous paragraphs. The path of international cooperation in countries that can effectively contribute to the fight against

international corruption does not necessarily require an unlikely retreat on the part of the US, thus leaving room for support by the American country and by other foreign powers in the redemption action in business ethics (Von Rosenvinge, 2009).

Ultimately, the system envisaged by the FCPA and its application by the DoJ and the SEC provides for forms of cooperation between the judicial authorities and similar American authorities and compensation and determination mechanisms which coordinate financial sanctions for violations of the provisions. American anti-corruption also with the aim of avoiding the duplication of proceedings and critical issues especially in terms of ne bis in idem.

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